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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 415

DAVID A. GOLDNER,

Petitioner,

v.

EDWARD S. SILVER,
District Attorney, Kings County, State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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No.

DAVID A. GOLDNER,

Petitioner,

v.

EDWARD S. SILVER,
District Attorney, Kings County, State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of New York, entered in this cause on March 26, 1964, affirming an order of the Appellate Division, Second Department, permanently disbarring petitioner from the practice of law.

Citations to Opinions Below

The Report of the Special Referee is unreported and is printed in Appendix B, *infra*, p. 1.

The memorandum opinion of the Appellate Division, printed in Appendix B, *infra*, p. 68, is reported in 15

A.D. 2d 558, 222 N.Y.S. 2d 854 (December 27, 1961). The order of the Court of Appeals of New York (March 26, 1964), which affirmed the order of disbarment of the Appellate Division without opinion, is printed in Appendix B, *infra*, p. 70.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on March 26, 1964. Upon petitioner's timely application, the time within which petition for certiorari might be filed was extended by this Court from June 24, 1964 until August 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

Questions Presented

I. Whether the decisions in *Mapp* v. *Ohio* and *Malloy* v. *Hogan*, holding, respectively, that the Fourth and Fifth Amendments to the United States Constitution are commands upon the states through the due process clause of the Fourteenth Amendment, apply to preserve for review these due process questions in a state disbarment proceeding which originated in advance of these judicial pronouncements, but in which an appeal was pending at the time of these rulings.

II. Whether the federal exclusionary rule is a requirement of due process of law in state administrative proceedings, state grand jury investigations and state disciplinary actions against attorneys, whether or not such proceedings are criminal in nature.

III. Whether, during the course of an investigation of professional misconduct of lawyers, a subpoena *duces tecum* issued by a grand jury to a lawyer whose conduct was under investigation, which called for the production of all his books, cancelled checks, cash books, ledgers, check stubs, tax returns, bank books, record of all investments and all financial records, both business and personal, for the years 1953 through 1956 inclusive, was so broad as to constitute an illegal search within the meaning of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

IV. Whether the surrender to the state Judicial Inquiry of all of the financial records described in (III) above pursuant to its subpoena *duces tecum* was an illegal seizure of evidentiary matter in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

V. Whether, after timely demand, the refusal of the State district attorney, state and federal courts and the state Judicial Inquiry, to return petitioner's books and records during the three year interval between their seizure pursuant to subpoena in November, 1957 and the disciplinary hearing in December, 1960, deprived petitioner of his right to prepare a defense and therefore constituted a denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

VI. Whether petitioner's disbarment as a result of a finding against him in his disciplinary hearing on charges which had never been made against him prior to the hearing, and against which he had no opportunity to defend before the ruling against him, was in violation of the due process clause of the Fourteenth Amendment.

Constitutional Provisions Involved

The pertinent portions of the provisions of the United States Constitution here involved are set out below:

Amendment XIV, Section 1, Clause 2:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

Statement

Petitioner was admitted to practice law in New York in 1949. He is married and has two children. After a period of apprenticeship with another firm, he established his own office and developed an active practice in negligence cases. (H. 426-429).[1]

This case involves an order of disbarment and related orders made by the Appellate Division, Second Judicial

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[1] The transcript of the hearing before the Special Referee is referred to throughout as "H" followed by a page reference. The Report of the Special Referee is referred to as "Report". The Supplemental Record is referred to as "SR"; Supplemental Record A is referred to as "SRA". Numerical references following "SR" and "SRA" are to folios unless otherwise indicated.

Department of New York, pursuant to findings and recommendations of a Special Referee appointed to conduct the disciplinary hearing in question. The disbarment proceeding grew out of a judicial inquiry ordered by the Appellate Division, Second Department into solicitation and related practices in Kings County, New York.

As part of the Judicial Inquiry's investigation, on November 15, 1957 petitioner was served with a subpoena requiring him to produce for the Inquiry's examination all of his personal and business records, tax returns, bank books, check stubs and cancelled checks for the years 1953 through 1956, inclusive. (SR. 118-129; Appendix A, pp. 1-3) Upon compulsion of disbarment for failure to cooperate with the Inquiry, the petitioner complied with the terms of the broad and sweeping subpoena (SR. 32, 74, 83, 120). He testified before the Inquiry on two occasions in May and June of 1958 (SR. 33, 84). Thereafter, the Appellate Division, Second Judicial Department, ordered the District Attorney's office to proceed against the petitioner, and a petition charging 33 counts of misconduct was served. The matter was referred to a Special Referee, who, after a hearing, found the petitioner guilty on three of the counts contained in the petition. Petitioner was also found guilty of fabrication of evidence and perjury—charges which were nowhere contained in the petition and of which he had no notice prior to the written opinion of the Special Referee.

During the three-year hiatus between the issuance of the subpoena and the hearing, the petitioner made repeated attempts to get back his books and records. Oral and written requests for their return were made to the Presiding Justice of the Inquiry and to the District Attorney; application for the return and suppression of such evidence was made to the federal district court, and the Appellate Division, Second Judicial Department

on at least two occasions, all to no avail. (SR. 75-84; 181-183). The federal constitutional questions involving illegal search and seizure were raised throughout these proceedings (SR. 75-76, 77-82, 82-83). Although no court had ever impounded them, and no order of discovery had issued, and although they were vital to the petitioner's defense of the disbarment proceeding because they comprised all petitioner's financial records during the period covered by the charges against him, the Judicial Inquiry and the District Attorney's Office never returned them. Indeed, they were admittedly used by the agents of the Judicial Inquiry to develop evidence that appellant handled settlement payments to his clients improperly. The records in question consisted, among other things, of a ledger book, checks and check stubs for the four-year period covered by the charges against petitioner and they contained information essential to the preparation of his defense. But, with the exception of some of the records introduced into evidence, the records were not returned.

The Special Referee heard testimony in the proceeding against petitioner from December 1, 1960 until December 7, 1960. After the hearing, the Special Referee recommended disbarment (Report, pp. 60-61). On June 19, 1961, after the hearing but before the exhaustion of petitioner's appellate remedies, this Court applied the Fourth Amendment exclusionary rule to the States through the Fourteenth Amendment in *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

Thereafter, several motions were made before the Appellate Division. The District Attorney moved to confirm the Referee's Report. Petitioner opposed the motion and moved to set aside the report because the use of the illegally seized evidence at the hearing "violated the constitutional guarantees against illegal and unreasonable

search and seizure" and because withholding of the seized evidence from petitioner "was a deprivation of due process". (SR. 67-69) Petitioner's motion to set aside the report was denied (SR. 61-66). Respondent's motion to confirm the report was granted and petitioner was ordered disbarred (App. B-68). The court's memorandum opinion is reported at 15 App. Div. 2d 558, 222 N.Y.S. 2d 854. On March 26, 1964, the New York Court of Appeals affirmed the order of disbarment without opinion. (App. B-70). It is from this order that petitioner seeks relief by petition for certiorari in this Court.

Reasons for Granting the Writ

I.

Both *Mapp* v. *Ohio*, 367 U.S. 643 (1961) applying the federal exclusionary rule to the States as a constitutional command of the Fourth and Fourteenth Amendments, and *Malloy* v. *Hogan*, — U.S. —, 84 S.Ct. 1489 (1964), applying the self-incrimination clause of the Fifth Amendment to the States through the Fourteenth, were decided *after* the original disciplinary hearing which resulted in petitioner's disbarment, but *before* he had exhausted his appellate remedies.

Since petitioner urges that the minimal federal constitutional requirements of the Fourth and Fifth Amendments have not been met in the state proceeding which resulted in his disbarment (see argument *infra*, pp. 16-21), the question of the extent to which these landmark decisions will be applied retroactively is squarely before this Court.

While petitioner is aware of no case in which this Court has indicated the extent to which it would apply

the *Mapp* rule to pending litigation,[2] there have been several lower court pronouncements on the subject.[3] While they differ as to whether they would limit retrospective application of *Mapp* to pending litigation where regular appellate remedies had not been exhausted at the time the *Mapp* decision was announced[4] or permit *habeas corpus* even after the exhaustion of regular appellate remedies[5], the rule appears to be clear that *Mapp* applies to persons whose cases were pending on appeal at the time *Mapp* was decided. For "[t]heir cases were not yet past history when Mapp was decided."[6] Moreover, there is much to be said for the contention that application of *Mapp* to pending appeals is not retrospective application at all, since the exclusionary rule is applied only to cases which *subsequently* reach this Court.

While it is too early to find reported case experience dealing with the retrospective application of *Malloy* v. *Hogan*, there is analogous case experience to suggest that this Court will not look unfavorably upon such application of the rule there announced. E.g., *Griffin* v. *Illinois*, 351 U.S. 12 (1956); Cf. *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214 (1958) (*Griffin* rule applied to conviction in *1935*). See also *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116 (1956). Moreover, this Court has indicated in *Malloy* that its holding was implicit in *Mapp* v. *Ohio*.[7]

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[2] Cf. *Fahy* v. *Connecticut*, 375 U.S. 85 (1963).

[3] E.g., *Hall* v. *Warden*, 313 F. 2d 483 (4th Cir. 1963) *cert. den.* 374 U.S. 809 (1963); *U.S.* v. *Walker*, 323 F. 2d 11 (5th Cir. 1963) *cert. granted* — U.S. —, 84 S. Ct. 1340 (May 18, 1964).

[4] *U.S.* v. *Walker*, 323 F. 2d 11 (5th Cir. 1963) *cert. granted* — U.S. —, 84 S. Ct. 1340 (May 18, 1964).

[5] *Hall* v. *Warden*, 313 F. 2d 483 (4th Cir. 1963) *cert. den.* 374 U.S. 809 (1963).

[6] *U.S.* v. *Walker*, 323 F. 2d 11, 19 (5th Cir. 1963) *cert. granted* — U.S. —, 84 S. Ct. 1340 (May 18, 1964).

[7] *Malloy* v. *Hogan*, — U.S. —, 84 S. Ct. 1489, 1494 (1964).

Since both *Mapp* and *Malloy* were decided during the course of petitioner's appeal, it is just, proper and consistent with the policy of these cases to test the due process afforded petitioner in the state proceeding below by both Fourth and Fifth Amendment standards as commands upon the state through the Fourteenth Amendment.

II.

The respondent has urged (with startling success in the New York state courts below) that the petitioner has had all the due process of law he deserves because his disbarment proceeding was not a criminal action and that the exclusionary rule of *Mapp* v. *Ohio* cannot be applied to suppress illegally obtained evidence in non-criminal cases.[8]

This Court is now called upon to determine (A) whether a disbarment proceeding is of a sufficiently criminal nature to compel the strict application of the requirements of criminal due process in testing its constitutional validity, or (B) whether, notwithstanding its non-criminal administrative nature, the judicial inquiry and disciplinary proceeding in which petitioner was involved was still subject to the *Mapp* exclusionary rule.

A.

Disbarment is equivalent to a criminal proceeding.

It seems elementary that a legal proceeding in which the prosecuting arm of the state initiates an action against an accused for wrongful acts which, if proved, will result in punishment of the accused by ordering his valuable

[8] Citing *Sackler* v. *Sackler*, 229 N.Y.S. 2d 61 (1962) as authority for his contention.

property confiscated bears a striking similarity to criminal proceedings. As Mr. Justice Black has pointed out in discussing a denial of admission to the bar[9] in *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 257-258 (1957):

> "While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer."

The severe consequences of disbarment have long been recognized[10] and recently clearly and eloquently described by Mr. Justice Black:

> "It is beyond dispute that one of the important ends served by the practice of law is that it provides a means of livelihood for the lawyer and those dependent upon him for support. That means of earning a livelihood is not one that has been conferred upon the lawyer as a gift from the State. Quite the contrary, it represents a substantial investment in time, money and energy on the part of the person who prepares himself to go into the legal profession. Moreover, even after a lawyer has been admitted to practice, a further substantial investment must be made to enable the lawyer to build up the sort of good will that lies

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[9] See Mr. Justice Harlan, speaking for the Court in *Cohen* v. *Hurley*, 366 U.S. 117, 123 (1961):

> "The fact that such refusal was here made a ground for *disbarment*, rather than for *denial of admission to the bar* . . . is not of constitutional moment." (Emphasis added)

[10] See *Hudson* v. *Slade*, 3 Foster and Finlason (Q.B.) 390. 411 (1862):

> ". . . short of those heavy consequences that would attach to the greater and more heinous offences, I own I can conceive of no jurisdiction more serious than that by which a man may be deprived of his degree and status as a barrister, and which, in such a case—perhaps, after he has devoted the best years of his life to this arduous profession,—deprives him of his position as a member of that profession, and throws him back upon the world to commence a new career as best he may, stamped with dishonour and disgrace."

at the root of any successful practice. Young lawyers must and do take on cases in which their ultimate fee is only a fraction of the real value of the work they put into the case in order to build up this sort of goodwill. The lawyer's abilities, acquired through long and expensive education, and the goodwill attached to his practice, acquired in part through uncompensated services, are capital assets that belong to the lawyer—both as a lawyer and as a man, assuming that such a conceptualistic distinction can be drawn.

"These assets should be no more subject to confiscation than his home or any other asset he may have acquired through his industry and initiative. If they are used in violation of an already-existing clear requirement of the law which pronounces as a penalty for violation confiscation of the assets, and if the violation is established in a proceeding in which all the requirements of the 'law of the land' are satisfied that is one thing. But to confiscate the earning capacity that represents a large part of a lawyer's lifetime achievements on the theory that no such asset exists is quite another. The theory that the practice of law is nothing more than a privilege conferred by the State which it can destroy whenever it can assert a 'reasonable' justification for doing so seems to me to permit plain confiscation.

"Even apart from the financial impact, the disbarment of a lawyer cannot help but have a tremendous effect upon that lawyer as a man. The dishonor occasioned by an official pronouncement that a man is no longer fit to follow his chosen profession cannot well be ignored. Such dishonor undoubtedly goes far toward destroying the reputation of the man upon whom it is heaped in the community in which he lives. And the suffering that results falls not only upon the disbarred lawyer but upon his family as well. Government certainly should not be allowed to do this to a man without according him the full benefit of the 'law of the land', both constitutional and statutory."

Cohen v. *Hurley*, 366 U.S. 117, 145-147 (dissenting opinion).

Little wonder it is, then, that this Court has clearly announced that "[a] State cannot exclude a person from the practice of law . . . in a manner or for reasons that contravene the Due Process . . . Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232, 238-239 (1957).

To the extent that *Cohen* v. *Hurley*, 366 U.S. 117, 126 (1961) appears to suggest a different emphasis, it must be remembered that only the availability of state constitutional rights in a state disciplinary proceeding were there involved.[11]

Whether it be deemed a "right" or a "privilege", "[c]ertainly the practice of law is not a matter of the State's grace".[12] and disbarment proceedings involve risk of such substantial penalties and bear such a close resemblance to accusatorial criminal procedure as to require at least strict compliance with criminal due process standards.

B.

The exclusionary rule should apply to all legal proceedings, civil or criminal.

Notwithstanding petitioner's argument above (pp. 9-12) that criminal due process, including the *Mapp* exclusionary rule, should be applied to test the due process

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[11] See Mr. Justice Harlan's language for the Court in *Cohen* v. *Hurley*, 366 U.S. 117, 127-128 (1961):

> ". . . it is suggested that the 14th Amendment gave petitioner a *federal* constitutional right not to be required to incriminate himself in the state proceedings . . . That proposition, however, was explicitly rejected by this Court, upon the fullest consideration, more than fifty years ago, *Twining* v. *New Jersey*, 211 U.S. 78 . . . and such has been the position of the Court ever since." But *cf. Malloy* v. *Hogan*, — U.S. —, 84 S. Ct. 1489 (1964), overruling *Twining* v. *New Jersey*, *supra*.

[12] *Schware* v. *Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 239, fn. 5 (1957).

afforded him in the state disciplinary proceeding below because of its *quasi-criminal* nature, petitioner urges the Court to examine the policy reasons behind the exclusionary rule and extend its application to *non-criminal* cases in which the government, federal or state, has had a hand in obtaining the tainted evidence which is sought to be excluded.[13]

What are the policy reasons behind the holding in *Mapp* v. *Ohio* that the rule of exclusion is a constitutional command rather than a mere rule of evidence to be adopted or rejected by each sovereign state at will? It seems clear from the language of the Court in *Mapp* that there were at least three reasons, intertwined to be sure, for so holding: *First,* to demonstrate dramatically and effectively the important place occupied by the right of privacy in our constitutional scheme of freedom;[14] *Second,* to preserve to the government and the courts "that judicial integrity so necessary in the true administration of jus-

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[13] Petitioner is not now urging that evidence illegally obtained by a private person is subject to the operation of the exclusionary rule, although a cogent case can be made to demonstrate the implicit undercutting of the basis of *Burdeau* v. *McDowell*, 256 U.S. 465 (1921), which so held, by *Elkins* v. *United States*, 364 U.S. 206 (1960) (tainted evidence procured by persons not restrained by the command of the Fourth Amendment but turned over to gvoernment agents who are so restrained, held: properly excluded). See dictum in *Williams* v. *United States*, 282 F. 2d 940, 941 (6th Cir. 1960).

[14] "Were it otherwise, then just as without the Weeks rule [of exclusion in federal cases] the assurance against unreasonable federal searches and seizures would be 'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty' " *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961).

tice";[15] and *Third*, "to deter—to compel respect for the constitutional guaranty in the only effective available way —by removing the incentive to disregard it".[16] Petitioner urges that all of these reasons—dramatic, moral and practical—are at least as operative in non-criminal litigation as in criminal proceedings. For, while non-criminal administrative proceedings are important, "they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers and other criminal elements"[17] where the exclusionary rule admittedly operates. "It would seem that the public interest in protecting privacy is equally as great in one case as in another."[18]

It must be remembered that *Boyd* v. *United States*, 116 U.S. 616 (1886), which established the rule that use of illegally obtained evidence invalidates the entire legal proceedings in which it is used and which was the point of origin of the long history of the *Mapp* doctrine, was itself a non-criminal administrative proceeding. Moreover, the principles involving the law of search and seizure and the exclusionary rule have been applied by this Court in other cases involving administrative proceedings. Cf. *Abel* v. *United States*, 362 U.S. 217 (1960); *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263 (1960); *Frank* v. *Maryland*,

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[15] *Mapp* v. *Ohio*, 367 U.S. 643, 660 (1961) and see Mr. Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928):

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." (quoted with approval in *Mapp* at page 659.)

[16] *Elkins* v. *United States*, 364 U.S. 206, 217 (1960), quoted with approval in *Mapp* at page 656.

[17] *Frank* v. *Maryland*, 359 U.S. 360, 374 (1959) (dissenting opinion).

[18] *Ibid.*

359 U.S. 360 (1959); *District of Columbia* v. *Little*, 178 F. 2d 13, *affirmed on other grounds*, 339 U.S. 1 (1950).

As Christ, *J.*, dissenting in *Sackler* v. *Sackler*, 229 N.Y.S. 2d 61, 65 (1962)[19] has pointed out:

> "The fact of this recent pronouncement in *Mapp* v. *Ohio*, highest court in our land and its application in all Federal and State Courts in criminal prosecutions gives new vitality to the claim for exclusion of tainted evidence in all lawsuits, civil as well as criminal. It is a strange concept which would permit a court of law to encourage the commission of illegal acts by honoring the fruits of the illegality, and which would permit the perpetrator to win a lawsuit by deliberately violating the law.
>
> "It would be a still greater anomoly to bar tainted evidence in a criminal case but at the same time permit its introduction in a civil suit. There is no sound reason for a different rule of admissibility between civil and criminal cases. It should be the same in both. Evidence obtained by the deliberate commission of a crime should be inadmissible on behalf of the perpetrator in the trial of a civil action.

Or, as Judge Hopkins has stated the point:

> "It is anomolous to enforce opposite rules concerning evidence blighted by the same pollution. The unlawful search violates the identical privacy whether its fruits are used to convict in a criminal prosecution, or to forfeit a personal right in a divorce action." *Sackler* v. *Sackler*, 229 N.Y.S. 2d 61, 66 (dissenting opinion). See also *Lebel* v. *Swincicki*, 354 Mich., 427, 93 N.W. 2d 281 (1958); *Chicago* v. *Lord*, 3 Ill. App. 2d 410, 122 N.E. 2d 439 (1954), *affirmed* 7 Ill. 2d 379, 130 N.E. 2d 504 (1955); Cf. *Hartman* v. *Hartman*, 253 Wis. 389, 34 N.W. 137 (1948).

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[19] Although respondent has attempted in the Courts below to support his position that the exclusionary rule is not applicable to civil cases by citing *Sackler*, a careful reading of the holding demonstrates that it is confined to the issue of tainted evidence procured by *private persons*, an issue not raised here.

Nor is this a radical departure from history. For it must be noted that "the Fourth Amendment in origin had to do as much with ferreting out heretics and collecting taxes as with enforcement of the criminal laws.[20]

This Court is now called upon to reaffirm its position originally taken in *Boyd* and revitalized in the cases which followed *Boyd*, and to set at rest the erroneous contention that the clear prohibitions against invasion of privacy are somehow not enforceable against administrative officials in non-criminal proceedings.

III.

In the course of the investigation of misconduct of lawyers by the Judicial Inquiry, petitioner was served with a broad and sweeping subpoena which required him to produce, under penalty of law, all of his business and personal records for a four-year period.

It is petitioner's contention that (A) the compelled production of his private papers was tantamount to a search and seizure restricted by the imperatives of the Fourth and Fifth Amendments as enforced against the States through the Fourteenth; (B) the broad and sweeping subpoena with which he was served constituted a general and roving search expressly prohibited by the Fourth Amendment as enforced against the States through the Fourteenth; (C) his compliance with the subpoena did not constitute consent to the broad search, nor waiver of his constitutional rights.

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[20] *Abel* v. *United States*, 362 U.S. 217, 242 (1960) (dissenting opinion).

A.

The subpoena was tantamount to search and seizure.

While a great many of the cases which have delineated the law of search and seizure have been cases involving forcible physical searches by policemen, either with or without judicial warrants, it cannot at this late date be denied that compulsory production of private papers by legal process is equivalent to, and treated for constitutional purposes as, a search and seizure. *Boyd* v. *United States*, 116 U.S. 616 (1886); *Essgee Company of China* v. *United States*, 262 U.S. 151 (1923). Similar treatment is afforded such compulsory production by subpoenae *duces tecum*. *Essgee Company of China* v. *United States, supra.* And the fact that the papers whose production is thus compelled belong to an individual rather than a corporation requires the particularly unrestricted application of the protections of the Fourth and Fifth Amendments. *Essgee Company of China* v. *United States, supra.*

B.

The broad subpoena was a roving and general search.

The Fourth Amendment expressly prohibits searches without warrants "*particularly describing the place to be searched,* and the *persons or things to be seized.*" This language has its roots in this country's origins. The founders were all too acutely aware of the evils of the general warrant and the writs of assistance.[21]

As a consequence of this historical development, the explicit command of the Fourth Amendment and the im-

[21] For a historical account, see *Henry* v. *United States*, 361 U.S. 98, 100-101 (1959) and *Harris* v. *United States*, 331 U.S. 145, 157-163 (1947) (dissenting opinion).

peratives of a free society, this Court has frequently and resolutely set its face against general or roving searches. *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961). See also Justice Butler's strong language in *Marron* v. *United States*, 275 U.S. 192, 195-196 (1927):

> "General searches have long been deemed to violate fundamental rights. It is plain that the [Fourth] Amendment forbids them . . .
>
> "The requirement that warrants shall particularly describe the thing to be seized makes general searches under them impossible. . . ."

In the instant case, the Judical Inquiry used a broad subpoena *duces tecum* as a dragnet to ensnare all of petitioner's business and personal records over a four-year period, without regard to possible relevance to the subject of the investigation, and to sift out at its leisure the tasty and incriminating morsels of evidence it had trapped. Never has there been such a classic example of a general and roving search, nor such a pristine demonstration of the patent unfairness of such a procedure.

C.

Petitioner's compliance with the subpoena was neither waiver of constitutional rights nor consent to search.

It is readily apparent that a valid waiver of rights or consent to search can operate only under circumstances where a conscious, volitional choice, free of duress or official pressure, may be made. To this end the courts have always been sensitive to the distinction between waiver of constitutional rights and bare submission to authority[22] in their effort to "indulge every reasonable presumption against waiver of fundamental constitutional

[22] *Johnson* v. *United States*, 333 U.S. 10 (1948); *Amos* v. *United States*, 255 U.S. 313 (1921).

rights." *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938), quoting in part from *Aetna Ins. Co.* v. *Kennedy,* 301 U.S. 389, 393 (1937).

For this reason a person under the compulsion of a subpoena cannot be deemed to have given consent to a search. *Nelson* v. *United States,* 208 F. 2d 505 (D.C. Cir. 1953), *cert. den.* 346 U.S. 827 (1953).

Quite apart from these general considerations, petitioner was placed in an impossible dilemma when he received the broad subpoena *duces tecum* of the Judicial Inquiry. He knew that the Inquiry was investigating his alleged professional misconduct as part of its general investigatory scheme; he knew that his refusal to cooperate fully with the Judicial Inquiry by fully disclosing all information it sought, might well be grounds for disbarment or discipline for such failure to disgorge. *Re Cohen,* 199 N.Y.S. 2d 658 (1960), *affirmed Cohen* v. *Hurley,* 366 U.S. 117 (1961); *In re Anastaplo,* 366 U.S. 82 (1961); *Konigsberg* v. *State Bar of California,* 366 U.S. 36 (1961).

Recognition of the dilemma in which petitioner found himself, and reference to the many occasions in the record in which petitioner sought to assert his constitutional right to protect the private papers which were the subject of the subpoena, lead ineluctably to the conclusion that petitioner neither consented to the search nor waived any of his constitutional rights regarding his private papers by complying with the express and compelling language of the subpoena *duces tecum* served upon him by the Judicial Inquiry.

IV.

Petitioner further contends that the compulsory production of his books, records and private papers pursuant to subpoena *duces tecum* was a seizure of his private documents—documents which were neither contraband, instrumentalities, nor fruits of crime—for the purpose of using them as evidence.

It has long been established that, by the intertwined effect of the search and seizure restrictions contained in the Fourth Amendment and the self-incrimination prohibition of the Fifth, the compulsory seizure of private papers which are neither contraband, instrumentalities nor fruits of crime is constitutionally prohibited. *Boyd* v. *United States,* 116 U.S. 616 (1886); *Entick* v. *Carrington,* 19 Howell's State Trials 1029 (1765); *Gouled* v. *United States,* 255 U.S. 298 (1921).

In the instant case, the financial records, check books and business records which were seized by the Judicial Inquiry could by no flight of imagination be regarded as contraband; they were records which petitioner as a lawyer and a private citizen was entitled to keep without violating any law. Neither were these records fruits or instrumentalities of any crime. See *Boyd* v. *United States,* 116 U.S. 616 (1886) (business invoices connected with the alleged fraudulent import of cases of plate glass, held: evidentiary); *United States* v. *Lefkowitz,* 285 U.S. 452 (1932) (bills, business cards, stationery, receipts, records, lists of names and addresses used in connection with illicit liquor business, held: evidentiary); *Freeman* v. *United States,* 160 F. 2d 72 (9th Cir. 1947) (stock record books, held: evidentiary); see also *Takahashi* v. *United States,* 143 F. 2d 118 (9th Cir. 1944); *In re Ginsburg,* 147 F. 2d 749 (2d Cir. 1945); *United States* v. *Lerner,*

100 F. Supp. 765 (N.D. Cal. 1951) (address book, held: evidentiary); *United States* v. *Thomson*, 113 F. 2d 643 (7th Cir. 1940); *Bushouse* v. *United States*, 67 F. 2d 843 (6th Cir. 1933). Consequently, the only conceivable use which could be made of the private papers whose production was compelled here was, as respondent's electic offering of such documents in evidence at the subsequent disciplinary proceeding amply demonstrated, solely as evidence of improper professional conduct sufficient to cause his disbarment. Such evidentiary matter is constitutionally immune from compulsory production or seizure even upon judicial warrant based upon probable cause. *United States* v. *Lefkowitz*, 285 U.S. 452 (1932).

Since the pertinent portions of both the Fourth and Fifth Amendments have become commands upon the states through the due process clause of the Fourteenth, *Mapp* v. *Ohio*, 367 U.S. 643 (1961) and *Malloy* v. *Hogan*, — U.S. —, 84 S.Ct. 1489 (1964), the compulsory production of the petitioner's private papers by an arm of the State of New York for use as evidence against him in a subsequent disbarment proceeding renders the entire state proceedings below constitutionally defective.

V.

Quite apart from the illegal search and seizure of evidence discussed in Arguments III and IV above, petitioner contends that the refusal of the prosecutory and judiciary organs of the State of New York to return petitioner's private papers to him, after timely demand, during the three-year interval between the time they were originally subpoenaed in November, 1957 and the disciplinary hearing in December, 1960, was a denial of due process of law under the Fourteenth Amendment which independently invalidates the proceedings below.

It is too late in the day to deny that a person charged with an act which involves either punishment or forfeiture must, as a matter of due process, have an opportunity to prepare and be heard in his own defense. *In re Oliver,* 333 U.S. 257 (1948). As a part of the preparation of a defense, the right to discover and inspect documents, even those which result from the work-product of the adverse party, is a matter of grave importance. *Roviaro* v. *United States,* 353 U.S. 53 (1957); *Jencks* v. *United States,* 353 U.S. 657 (1957).

And the right to an opportunity to prepare a defense obtains in non-criminal administrative proceedings as well as in criminal cases. *Greene* v. *McElroy,* 360 U.S. 474 (1959).

But a more compelling case for full disclosure than the case at bar can hardly be imagined; for here all the petitioner sought was the return of *his own private papers* so that he might prepare a defense against the charges based upon these documents. And for three years petitioner was met with consistent and arbitrary judiciary and administrative refusal to comply with this most basic and proper request. If, in response to an accusation, the right to prepare a defense has any meaning at all, this case requires reversal.

VI.

Lastly, petitioner contends that the finding against him for perjury—a charge which had never been presented to him in advance of the hearing, against which he never had an opportunity to interpose a defense, and of which he learned for the first time in the Report of the Special Referee after the hearing—was a denial of due process of law under the Fourteenth Amendment which independently invalidates the proceedings below.

One of the essential elements of due process of law is the right of an individual to have reasonable notice of a charge against him sufficiently in advance of trial so that he may have an opportunity to adequately prepare a defense. *In re Oliver*, 333 U.S. 257 (1948). And this principle is equally well established in non-criminal administrative proceedings. *Greene* v. *McElroy*, 360 U.S. 474, 497 (1959). Moreover, where the finding against the accused is that he has given false testimony before the court, such a finding in the absence of a prior charge against him which he had an opportunity to defend, is a denial of due process of law. *In re Oliver, supra.*

Nor need petitioner demonstrate prejudicial error by proving that he would not have been disbarred but for the perjury finding without prior notice, even though a sound argument may be made on this point.[23] For where unconstitutional procedure has tainted a hearing or trial, the test of reversal is not whether there was sufficient basis to support the result, apart from the constitutionally polluted procedure, but rather, whether there is a *reasonable possibility* that the unconstitutional procedure *might have contributed* to the result. See *Fahy* v. *Connecticut*, 375 U.S. 85 (1963).

This broad test of reviewability is clearly met in the case at bar. A finding that petitioner had been guilty of perjury at his own disciplinary hearing might well have meant the difference between complete disbarment and less drastic disciplinary action, or none at all.

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[23] Since the corroboration which the Referee found necessary to establish the third charge of subornation resulted from the fourth finding that petitioner committed perjury himself, it is clear that these two charges, at least, are inextricably intermingled for purposes of this petition. Inasmuch as the crucial findings of the Special Referee (Report, pp. 60-61) indicate that "I should add that if Items 1 and 2 above were alone involved I would recommend that the punishment to be imposed upon [petitioner] be a severe censure," the importance of the fourth adverse finding as affecting petitioner's disbarment is readily apparent.

Conclusion

Petitioner has pointed out a number of areas in which his rights as a private citizen were emasculated in the disciplinary proceedings which resulted in his permanent disbarment from the practice of law in the State of New York. The zeal of the administrative and judiciary personnel of the State of New York to protect the public against unprofessional conduct of lawyers is highly commendable. But they must, in the process, understand that:

> "A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms to obtain that goal."[24]

Grant of certiorari in this case by this Court will accelerate such understanding.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD A. BERKMAN,
Counsel for Petitioner.

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[24] *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 273 (1957).

APPENDIX A

BY MAIL

THE PEOPLE OF THE STATE OF NEW YORK

To:

DAVID GOLDNER
401 Broadway
New York, N. Y.

GREETING:

WE COMMAND YOU, That all business and excuses being laid aside, you appear and attend before HONORABLE GEORGE A. ARKWRIGHT, a Justice of the Supreme Court of the State of New York, at an ADDITIONAL SPECIAL TERM OF THE SUPREME COURT FOR THE COUNTY OF KINGS, at Room Number 301, 3rd floor, Borough Hall, Court and Joralemon Streets, in the Borough of Brooklyn, City and State of New York, on the 20th day of November, 1957, at 10:00 o'clock, in the forenoon, and at any adjourned date to testify and give evidence in a certain proceeding now pending in the said Court, then and there to be conducted, consisting of a Judicial Inquiry, pursuant to order of the Appellate Division of the Supreme Court of the State of New York, for the Second Department, dated January 21, 1957, as amended, with respect to all matters relative thereto, and that you bring with you, and produce at the time and place aforesaid,

1. Day Book (reflecting daily receipts)
2. Cash receipts book
3. Cash disbursements book
4. Petty cash book
5. Petty cash vouchers
6. General Ledger and General Journal

7. Cancelled checks and bank statements for personal account, regular account, special account, closed and current, check books
8. Savings Bank, Savings and Loan Association and/or any other Depository pass book, closed and current
9. Record of stock investments, U.S. Savings Bonds, mutual investment fund and/or any other similar investment
10. Payroll Records:
    (a) Payroll Book and Social Security Tax and Withholding Tax returns
11. And any and all financial records pertaining to your business and/or person not itemized above, including Federal and State income tax returns for the period January 1, 1953 to December 31, 1956,

now in your custody, and all other deeds, evidences and writings, which you have in your custody or power, concerning the premises, and for a failure to attend you will be deemed guilty of contempt of Court, and liable to pay all damages sustained thereby and forfeit FIFTY DOLLARS in addition thereto.

WITNESS, HONORABLE GEORGE A. ARKWRIGHT, one of the Justices of said Supreme Court, presiding at the said Additional Special Term thereof, at said Borough Hall, Court and Joralemon Streets, Borough of Brooklyn, City and State of New York on the 15th day of November, 1957.

JOSEPH B. WHITTY
Clerk

DENIS M. HURLEY
Counsel for the Judicial Inquiry
Room 301, 3rd floor
Borough Hall
Court and Joralemon Streets
Brooklyn 1, New York

IT IS HEREBY STIPULATED that, the above matter having been adjourned to the day of 195 , the undersigned Witness is hereby excused from attending on said date but agrees to remain subject to the call of the Counsel for the said Judicial Inquiry.

Dated: 195

.....
Witness

.....
Counsel for the Judicial Inquiry

Endorsement pursuant to Civil Practice Act §403-a:

The Witness is Bound by this Subpoena to appear at the hearing or examination and at any adjourned date thereof.

APPENDIX B

(A)*

Report and Recommendations

SUPREME COURT : STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

In the Matter of the Petition of,
EDWARD S. SILVER,
Petitioner,
against
DAVID A. GOLDNER,
Respondent.

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Client	Retained Attorney	p	Doctor	p	Dates Accident	p	Closing, etc.
Buscemi	Goldner	8	Ray	9	3/31/51	7	(Levine & Baker
Schmidt	Goldner	77,87	Tendler	78	8/ 1/52	76	7/13/53 (PX 35,36)
Dascoli	Conrad	145	Marcus	148	8/ 9/53	145	12/10/54 (PX 5,6)
Luckman	Goldner	182	No evdnc		1/ 7/53	181	6/9/54 (PX 9,10)
Ketcham	Conrad	198	Not involved		11/24/54	195	Not involved
Zucker	Conrad	282	No evdnc		6/21/53	281	3/19/54 (PX 17,18)
Gart	Conrad	315	Unnamed	316	1951-1952	315	1/27/53 (PX 20)
Granat	Goldner	325	No evdnc		1953	324	6/28/54 (PX 21,22)
Stein	Goldner	340	Gardstein	704	1/14/54	340	(Bp & sub perj
Campbell	Goldner	361	No evdnc		7/28/54	361	6/12/56 (PX 25,26)
Groeger	Conrad	365	No evdnc		2/12/54	365	9/8/54 (PX 28)
Borsack	Goldner	379	Unnamed	384	Dec. 1952	378-379	6/29/54 (PX 29,30) (PX 31)

(1)

SUPREME COURT

STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

REPORT AND RECOMMENDATIONS

In the Matter of the Petition of,

EDWARD S. SILVER,

Petitioner,

—against—

DAVID A. GOLDNER,

Responent.

This proceeding was begun by service of a petition charging Respondent with various acts of professional misconduct, malpractice, fraud, deceit and conduct prejudicial to the administration of justice (Judiciary Law, Section 90). His answer is a general denial. The issues were referred to me as a Special Referee for hearing, report and recommendation. The hearing has been had and proof taken from both parties. A stenographic record of the proceedings, together with the exhibits offered and received, is submitted herewith.

At the commencement of the hearing, the taking of an oath by me as Special Referee was waived by stipulation. It was also stipulated that if it became impractical for me to make and file my report before the end of the year 1960, (when my designation as Special Referee would terminate) the submission would be deemed continued before me, despite the fact that I would then no longer be a Special Referee, and that my report might be made to this Court, in due course, in whatever official status I might then occupy.

The hearing before me was concluded December 7, 1960. The briefs of the respective parties were submitted to me in mid-January 1961. Since January 1, 1961 I have been a Judge of the County Court, Queens County. On March 3, 1961, this Court, made an order designating me as Acting Justice of the Supreme Court, and it is in that capacity that this report is being submitted.

(2)

Respondent was admitted to the practice of the law by This Court in June 1949. About a year later he commenced his own practice in an office in New York County and has since maintained one there, although in different locations. In January, 1957, This Court ordered an investigation into the conduct of attorneys and their associates and, as one of the results of the investigation conducted by that authority, Petitioner, as District Attorney of Kings County, was directed to and did begin this proceeding. The acts of misconduct specified in the petition are alleged to have occurred between the years 1950 and 1957.

Taken seriatim, and by reference to the numbered and lettered paragraphs of the petition they are, in substance:—

7a to j:— That between the years 1950 and 1957 Respondent conspired with each of five named doctors, to cheat and defraud insurance companies, and others, through the use of false and exaggerated medical bills and reports and that he, in furtherance of the plan, referred patients to each doctor for the purpose of securing from him false and exaggerated medical bills and reports, for the purpose, and with the ultimate intent of presenting them to various companies and of inducing them to part with money in reliance thereon. Petitioner's bill of particulars more precisely alleges (Paragraph 1 [d], in substance, that the bills were to be, and in fact were, false

and exaggerated in that they exaggerated the number of visits by each of the persons, also named in the bill of particulars (Paragraph [1-a]), to the respective doctors, thereby effectuating a corresponding, fraudulent increase in the amount of the medical charges for the doctor's services in the particular case.

(3)

The doctors, and the periods of their respective conspiratorial engagements with respondent, are alleged to be as follows:—

7a-b:	Louis Ray	1950 to 1957
7c-d:	Maurice Feder	1953 to 1957
7e-f:	Henry F. Gardstein	1953 to 1957
7g-h:	Jack Tendler	1953 to 1957
7i-j:	Herbert A. Cohen	1954 to 1957

At the conclusion of the hearing, Petitioner's counsel conceded that the Feder, Gardstein and Cohen conspiracies had not been established and, indeed, there is no proof that they ever existed. I THEREFORE RECOMMEND DISMISSAL of the specifications set forth in paragraphs 7c-d; 7e-f; and 7i-j of the Petition.

Nor, in my opinion, is the evidence sufficient to sustain the charges made in paragraphs 7a-b (Ray conspiracy) and 7g-h (Tendler conspiracy) and I THEREFORE RECOMMEND DISMISSAL of the specifications therein set forth. My reasons for those conclusions and recommendations follow.

Out of the medical personnel alleged to have been involved, only Doctors Ray and Tendler were called as witnesses. While their testimony, when taken with the other evidence in the case, amply justifies a conclusion that each exaggerated his medical report in one instance, neither gave testimony which would support a conclusion that respondent either counseled or procured the report to be exaggerated, or knowingly and intentionally forwarded or

caused it to be forwarded to the insurer with knowledge of its fraudulent character. Respondent denied implication in those or any other instances and his guilt in any case is not made out by the other evidence.

Of the nineteen lay persons named in the bill of particulars (as having been referred to the doctors) only nine were called to testify. Of these, there were three (John Campbell, (4) Ralph Groeger and Gilbert Zucker) who gave no evidence whatever, relevant to this branch of the case. A fourth (Stanley Gart) testified that his retained counsel (not respondent) referred him to a doctor, but went no further. A fifth (Hyman Borsack) testified that he and his wife went to a doctor (unnamed) recommended by respondent and that he (Borsack) neither received ("direct") nor ever paid a doctor's bill, but that was as far as he went. A sixth (Jack Stein), after giving some evidence in another area, invoked his privilege against self-incrimination when questioned as to whether he had spent, or told anyone he had spent, sums of money for doctor's bills. Respect for his privilege foreclosed further inquiry. Respondent's testimony revealed that Stein had been recommended to Doctor Gardstein by one of respondent's associates but, as noted at the outset, it is conceded that the alleged Gardstein conspiracy stands unproved. Of the remaining three witnesses, one, William V. Buscemi, gave testimony which, if credited, tends to connect respondent with a conspiracy involving Buscemi and Doctor Ray. The other two, Max and Martha Schmidt, gave evidence which established that Doctor Tendler had exaggerated the number of their visits to him. Concerning Buscemi, the words "if credited" are used in the fullest sense of their connotation.

He did not testify that there was any express agreement of the nature alleged in the petition and bill, nor did he circumstantially connect respondent, in the first instance, with an exaggerated report, forwarded by Doctor

Ray to the insurer, in February, 1952. (*1) Both respondent Doctor Ray (5) denied any such conspiracy. The components of its evidentiary foundation are:—(1) A glaring difference between the number of visits recorded on the doctor's office cards (fourteen) (*2) and the number appearing in the report sent to the insurer (at least sixty-nine); (2) the doctor's unconvincing explanation of the discrepancy (he couldn't find his records and anyhow, they were hodge-podge); (3) Buscemi's testimony [A] that respondent sent him to Ray, for treatment; [B] that in fact, he had visited Ray no more than ten times between 1951 and 1954; and [C] that when his case went to trial (April, 1955, Levine and Baker being trial counsel and respondent not participating), respondent suborned Buscemi to commit perjury as to the number of his visits to Ray and as to his loss of time and consequent loss of earnings. Thus, respondent's connection with the exaggerated report depends upon the worth of Buscemi's testimony that, on the trial, he committed perjury concerning the identical subject-matter, on the advice of respondent. In other words, the act of subornation is depended upon to justify an inference that respondent was connected with the false report, and culpably so, in the first instance. But nowhere in the case is there any evidence corroborating the word of the self-confessed perjurer and the charge of subornation cannot be maintained as a matter of law. And for the same reason, the instant charge cannot stand, since respondent is connected with the conspiracy only by this "rope of sand". The justice of the law is clearly demonstrated in this case, for Buscemi appears from the evidence to be a person who has little, if any, regard for the truth.

I am convinced that he perjured himself when he verified the bill of particulars in his action, alleging (6) that

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(*1) Petitioners Exhibit 3.

(*2) Petitioner's Exhibit 3.

he had been confined to home and bed for some four weeks immediately after the accident and had, consequently, lost some three weeks of earnings. He admitted that he perjured himself as to that on the trial, so the falsity is not in issue. But on the hearing, while he identified his signature to the bill, he denied recollection of having read or signed it. Yet he said that he never signs papers without reading them. He holds a degree as Bachelor of Science and Pharmacy and is, or was, a practising pharmacist. He refused to admit knowledge that he was *swearing* to the content of the bill but, reluctantly, admitted an awareness that he was *representing* the content to be true. A nice distinction, but purely conceptual.

In his testimony before me he admitted, in almost the identical words, that on the trial of his cause he had committed deliberate perjury, for the purpose of stealing money to which he knew he was not entitled. His claim that Respondent procured him to do so is met with a denial, but if the denial be insincere, it remains my opinion, on the evidence, that Buscemi's pose as a misguided innocent, perjuring himself at the trial:— " • • • only on the advice of counsel, my counsel • • •, is destroyed by evidence of earlier falsehoods, on the same plane, bespeaking a carefully conceived plan for perjury, thought out well in advance, and put into action by Buscemi himself.

The accident and injuries occurred March 31, 1951. On August 29, 1951, Buscemi was examined by Doctor Arthur A. Michele, a specialist (Orthopedic Surgery), to whom he had been referred by Doctor Ray. Doctor Michele testified at the hearing and of his credibility I have no doubt. He identified a written report of his findings, rendered to Doctor Ray on September 5, 1951. Among other things, it (*3) shows (7) that Buscemi gave his own case-history. In so doing, he stated that he had

(*3) Part of Petitioner's Exhibit 4.

come under Doctor Ray's care the day after the accident, that X-rays were taken and injections given, and "also *micro-wave* (*4) *treatments, once weekly up to and including the present time*". If true, that representation reflected at least twenty visits theretofore made by Buscemi to Doctor Ray. If false, it could either have been inadvertent or it could have been designed to serve a purpose and, of course, evidence of repetition of the act has a value in that area. It was repeated.

In January of 1954 he signed an application for life insurance. Among other things, he there stated that Doctor Ray *was treating* him for a disc-injury. In his testimony before me he agreed that the reference was to the same injury, sustained in the accident, and for treatment of which he had gone to Doctor Ray. But when asked if the latter was, in fact, still treating him therefor at the time of the application, Buscemi made another nice distinction. He could not remember, so he said, whether Doctor Ray was treating him *"right at that moment of time"*. If the implication (of continuity of treatment) in the application was false, Buscemi's persistence in falsehood negates the possibility of inadvertence and suggests a preconceived plan to defraud the insurer by falsehood, if possible, and by perjury, if need be. His prior consistent statements, if discovered (8) would give an insurer's counsel no material for impeachment. On the other hand, if the statement was true it, along with the

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(*4) Probably Doctor Michele's professional interpretation of what Buscemi told him. During the hearing, Buscemi spoke of "diathermy" and "heat" treatments.

The report discloses that the examiner found "signs suggestive of a herniated intervertebral disc and advised reexamination in six or eight weeks, as well as therapy. Another report, rendered October 16, 1951, shows that the reexamination was conducted October 15, 1951. (Part of Exhibit 4) This time, the patient said that since the last examination "he has attempted work of a limited nature" although he "has continued with his employment up to the present time." His "history and subjective complaints" were "indicative of a possible herniated itervertebral disc."

prior consistent statement, casts doubt upon his testimony that he visited Doctor Ray no more than ten times in the entire course of their doctor-patient relationship. One thing more.

During Buscemi's cross-examination on the hearing, it was developed that the major theme of a part of his trial-testimony was, in substance, that from the time of the accident, right up to the time of trial, he had been and was using, continuously, a drug called Tolerol (a pain-reliever), obtainable only by prescription. Before he became fully aware of the direction of the cross-examination, he was asked how long he would say that he took the medication. He answered that he couldn't recall exactly, but "I may have taken it *for three weeks,* and when the pain subsides, you stop taking it." When the cross-examiner charged Buscemi with perjury on his own initiative, he denied present recollection as to how long he had taken the drug and fell back upon the record of the testimony given by him at the trial:— *"If it is there, it's true."* He admitted, however, that Respondent had not spoken with him about that part of his testimony.

Petitioner places some reliance upon the fact that Respondent prepared (or was responsible for preparing), and served, a false bill of particulars in which Buscemi claimed an expense of $286.00 for medical services, etc. Respondent testified that he had no independent recollection of the matter but that, customarily, such information was obtained either from the client or the doctor. Petitioner's theory seems to be that bill enters the case on the (9) instant specification (it is elsewhere charged as a separate offense) as circumstantial evidence of respondent's connection with a scheme for exaggeration of the medical report later sent by Doctor Ray, to the insurer. But it is not shown that Respondent had anything to do with the concoction of the Ray report in the first instance, nor is it shown that Respondent knew, or should have known, that the matter set forth in the bill was false,

and he denies any such knowledge. Petitioner seems tempted to conclude the contrary because, three years later, the doctor's bill was comprised for less than half the amount that would have been his due for the number of visits therein listed. But the compromise does not justify any such conclusion with respect to Respondent.

First, there was nothing before Respondent, so far as the evidence shows, which should have excited suspicion of the information given him. At the lower, average office-fee mentioned by the doctor ($3.00), the sixty-nine visits would run $207.00. There were X-rays besides and, from the reports in evidence, it appears that Buscemi had been examined twice by Doctor Michele, and once by a Doctor Smith. Counsel would, in a personal-injury case, want and have knowledge of these things, so the facts at hand were not out of line with the amount claimed in the bill. And second, the compromise took place after other counsel had taken over and respondent was entirely out of the case.

During the trial, the presiding Judge evidently detected something amiss (Buscemi was undergoing cross-examination), counsel were called up by the Judge, there was some colloquy, Leon Siken (the attorney of record) was summoned and waived his fee and the case was settled. By direction of trial counsel, Buscemi paid Respondent nothing. Buscemi's (10) testimony before me was, that after the settlement, he paid one doctor (not naming him). Doctor Ray testified that he was paid $135.00, by an insurer's check, the bill being adjusted downward because Buscemi balked at the amount. The only discrepancy is in the date of payment, which must have been April or May of 1955 since the trial was under way on April 4, 1955. Doctor Ray's record shows that Buscemi paid the bill on May 19, 1954, but as already remarked, his records were not very well kept. At any rate, since Respondent had nothing to do with the compromise of the doctor's bill, its occurrence does not

betoken consciousness of falsity of the information on which the bill of particulars was prepared. Nor does it invite an inference that he was connected with any scheme to exaggerate the claim in the first instance or that he, with guilty knowledge, contrived to have the padded report sent to the insurer in the second instance. So much for the Ray conspiracy. Next to be considered is the Tendler affair.

The Schmidts and some of their relatives (Sprauer) were injured in an accident on August 1, 1952. It is not clear whether Respondent was retained directly, or whether the case was referred to him by a Leo or Leon Conrad, another attorney. Neither is it clear how Mr. and Mrs. Schmidt came to go to Doctor Tendler. At any rate, he treated them, although neither had a dependable recollection of the number of the visits. The husband said "maybe ten" but not thirty-one, and the wife said "ten times, no more", but certainly not forty-three. There was put in evidence a report written by Doctor Tendler on September 1, 1953 and thereafter forwarded to the insurer.

Tendler there certified that, between September 2, 1952 and July 1, 1953, Max Schmidt had visited him on thirty one (11) (specified) dates and Martha Schmidt on forty-three. He reflected his office-fee at five dollars per visit. There is no evidence that either of the Schmidts ever saw or even knew about this report. Neither paid the doctor's bill. According to Mrs. Schmidt, Respondent had told her that he would take care of it. Respondent testified that he did not confer with the doctor about the number of visits or the amount of his charges, that he had nothing to do with the preparation of the bills, knew nothing about their veracity and, when he received them for transmittal to the insurer, assumed them to be true. No other evidence contradicts him or suggests that he should have known that the bills were exaggerated. He testified that they were paid, by the insurer's checks, sent either to

the doctor or the clients, and that he got no part of the proceeds. And again, there is no evidence to the contrary. Doctor Tendler took the stand, took an oath and then, in my opinion, flagrantly violated it.

He "vaguely" remembered having treated the Schmidts, but didn't remember the details. However, he had "a record on every patient that I have seen". But he didn't have it with him. He identified his report on the Schmidts but couldn't remember who had asked him to prepare it nor where he had sent it. Normally, though (by extraction), such things would be forwarded to the attorney, in this case, Mr. Goldner. Tendler was paid for his services to the Schmidts directly, by check, from the insurer (Allstate). He did not rebate any part of the proceeds to Respondent. The amounts received (noted in red on the rear of two, and on the face of three of the bills) represented the fair and reasonable value of his services. But it was a "reconstructed" bill.

(12)

That is to say, he, having no record of the dates of the individual visits (by the Schmidts or anyone else) would have to get them from the patients. So he couln't tell whether the number was excessive and he had no recollection of the matter. As just hinted in this report, Doctor Tendler was a difficult witness. He leaned on "belief" and "thought"; he evaded until he was pinned down and an answer wormed from him; he vacillated and swung like a weather-vane, sensitive to what he thought was the wind-direction yet anxious to avoid being caught in the draft. There were few things of which he was positive. One was, that he was a busy man, couldn't take time to make records and didn't have records of the actual dates of his patients' visits to the office. He made all his charges after asking the patients to supply the number of their visits and he billed them on that basis. Of course, they didn't always give specific dates. In such cases, doctor

and patient would consult the calendar, the patient would indicate how many times he had visited in a given week, the doctor would pick out the dates in that week and that was how he arrived at his figures. Even in the Schmidt case, where his report was written a year after he first saw them (*5). He says his practice is a "peculiar type". Few will disagree. "I don't send bills to any of my patients. When they come in they will say 'Here is what I owe you' but I know it sounds screwy, but it just happens to be the truth". Petitioner's memorandum characterizes the testimony of this mock-witness as of "* * * strained * * * credulity, if not an outright lie." That is something of an understatement. He was a contemptuous, (13) craven perjurer. But casting out his testimony does not aid petitioner's case. The rejection of his lies does not supply evidence to the contrary of his false assertions. There is still unfilled the void that existed before he took the stand and, in all likelihood, yielded to a fear that the law would enmesh him. And well it might. That brings me to the next set of specifications, namely:—

7k to o: That Respondent recommended clients to Doctors Louis Ray (7-k), Maurice Feder (7-l), Henry F. Gardstein (7-m), Jack Tendler (7-n) and Herbert Cohen (7-o) and, in each case, agreed to and did pay the physician's fee, without reimbursement, in violation of Canon 42. In his bill of particulars, Peititioner alleges that the clients are the same as those named in the conspiracy charges (Par. 2-a); that they were referred to the doctors at or about the time of the retainer (Par. 2-b) and the sums paid the doctors are set forth in the form of grand totals for each year, from 1953 through 1956. The bill does not show what an individual doctor is alleged to have gotten in any one year, nor does it allege what sum any such doctor collected in the case of any particular client. And, the dates of respondent's alleged offenses not being

(*5) The Schmidts had testified and left before he took the stand.

alleged in the petition, it must be taken from the bill that they are claimed to have been committed in and between the years 1953 and 1957.

In my opinion these charges are not supported by the evidence. I THEREFORE RECOMMEND THE DISMISSAL of the specifications set forth in paragraphs 7-k to 7-o, both inclusive. My reasons are these.

(14)

The gist of this charge is the agreement to bear the expense, without reimbursement. Assuming, without deciding, that doctor's fees for treatment of the client's injuries are "expenses of litigation", the evidence does not show that Respondent agreed to or did pay them, without reimbursement, in any of the cases detailed by the bill of particulars. The persons whose testimony is depended upon are the same as those involved in the alleged conspiracies, and no others. But before considering their testimony, it should be remarked that evidence, independently of Respondent's testimony, confirmed a pattern of custom and usage whereby the medical bills were, in some instances, paid directly by the insurer and, in others, *through* Respondent, but not *by* him, in that he was expending trust moneys and not his own funds. Hence, evidence of a statement by him, to a client, that he would "take care" of a bill doesn't necessarily import an agreement to bear the expense without reimbursement. Conversely, evidence of actual payment *through* him does not necessarily evidence an act in accord with such an agreement. Both of these situations are presented by the evidence.

Doctor Ray testified that Respondent referred patients to him between 1951 and 1955, but specifically denied any agreement with Respondent for the payment of his fees for services rendered the clients. After a conference off the record, his answer to the question which elicited the testimony was stricken, the question was put again and the doctor refused, on constitutional grounds (self-incrimi-

nation), to answer. (15) He later testified that he was paid for his services to such patients, but not by Respondent. The only client named by him was Buscemi who, in his testimony, said that he had no recollection of any agreement with Respondent as to which of them would pay the doctor's bill. And, as previously noted, he also testified that the insurer footed the bill. Doctor Tendler, in his appearance on the stand, testified that Respondent paid the bills of the clients referred to him. Even if I believed him—and I do not—his testimony proves nothing in this case. Respondent is faced with specific charges involving named persons. Of those persons, only the Schmidts were named by Tendler as having been referred by Respondent. And the only evidence on the issue came from Mrs. Schmidt, who testified that Respondent had assured her that he would take care of the bill. But in the light of the other evidence as to the custom and usage, taken with Tendler's acknowledgment that, in fact, he was paid by the insurer, I do not regard Respondent's assurance as an agreement to bear the expense without reimbursement. As for the other six of the nine lay witnesses called to substantiate this charge, none testified to any such agreement or payment as here alleged.

In the John Campbell matter, an accountant testified as to the state of Respondent's financial record, and no assumption of the expense was reflected there. Respondent testified that he deducted all expenses before distribution and made no agreement with Campbell to share them. Campbell's testimony did not at all deal with this aspect of the case. The accountant also explored the matter of Ralph Groeger and found the expenses (16) charged off before the net was distributed. There was no evidence of assumption here and Respondent denied it. Likewise scrutinized by the accountant was the case of Gilbert and Gloria Zucker but here too, the expenses were charged off before distribution and Respondent so testified. In the cases of Stanley Gart, Hyman Borsack and Jack Stein,

the only evidence on the subject came from Respondent and it refutes the charge. Respondent was the one who idenified the doctor (Gardstein) in the Stein case and he testified, without contradiction, that Stein paid the bill himself, except for one report. Doctor Gardstein was not called. In some of these cases, items of expenses were paid *through* Respondent, but not without reimbursement. Hence, my conclusion that the charge cannot stand. The next charge is that Respondent practiced fraud upon his clients, i.e.,

7-p: That, to the detriment of his clients, Respondent, at divers times, falsely represented (to them) that he had expended various sums of money in the prosecution of their respective claims or suits and that he charged such sums, in whole or in part, to the clients, when, in truth and fact, the expenditures (claimed to have been made by him) were false and exaggerated. Petitioner's bill of particulars (Par. 3) confines the issue to five transactions which I summarize thus:—

(17)

Client	Amount allegedly claimed (and deducted)	Alleged amount of actual expenditure
Dominick Dascoli	$ 500.00	$119.50
Stanley Luckman	643.00	94.00
John Campbell	770.00	417.75
Gilbert Zucker & Gloria Zucker	1,033.00	328.80
Ralph Groeger	614.00	113.80

Petitioner's contention is, that in each case the fraud was perpetrated when respondent called the client in and distributed the proceeds of the settlement, and that the method was to issue two checks to the client's order. The larger (hereafter referred to as the "primary" check) was kept by the client, who received its proceeds. The other (to which I will refer as the "smaller" check) was handed

to the client who, in reliance on respondent's representation that it was "for expenses", endorsed and returned it to respondent. The contention is, that the client never got the proceeds of the check, but that respondent did, and that the representation was known by him to be false when he made it. Baldly stated, the charge is larceny by use of a false representation to the effect that expenses in the amount of the smaller check had actually been incurred in the client's interests and had either been paid or remained to be paid.

In my opinion the evidence does not sustain the offense charged and I THEREFORE RECOMMEND DISMISSAL of the specification alleged in paragraph 7-p of the Petition as particularized by paragraph 3 of the bill of particulars. My reasons follow.

Essential to guilt of the offense are the elements of representation, falsity, knowledge, intent to deceive and defraud, deception, reliance and the obtaining of the res with (18) intent to unlawfully deprive the owner thereof and to appropriate it to the use of the taker or another. In two of these cases there is failure of proof that the representation was made. In the other three, while there is evidence of an utterance, in the vein charged, the surrounding circumstances seriously question the existence of intent to deceive and defraud, actual deception and reliance. Or, to state the proposition more bluntly, no one was deceiving anyone else and the alleged "victims" weren't victims at all. They simply wanted to hear no evil and see no evil and, consequently, they didn't hear or see any. Or at least they wouldn't admit to it on the stand.

For proof of the representation, deception and reliance, as well as the detriment, Petitioner's case rests upon the testimony of the clients. For proof of the falsity, knowledge, intent, etc., it depends upon the testimony of an accountant who produced Respondent's records, including his ledger, and described, in some detail, his findings. The entries spanned the years 1953 to 1956, both inclusive, and

had been made on a cash-basis. In his examination the accountant had noted, on his worksheets, the gross amount of the settlement in each case and the manner of its distribution. In each case two separate sums were shown as paid to the client and they corresponded, respectively, with the amounts of the primary and smaller checks. In each case, specific items of expense were found to have been entered but, when added, did not correspond with the amount allegedly represented as having been deducted for "expenses" in the Dascoli, Luckman and Campbell cases. In the Zucker and Groeger cases the amounts exceeded those alleged to have been represented, and deducted. A part of the purpose of the accountant's analysis of the records had (19) been to determine whether or not the expenses of the case had been "taken off the top" and distribution made on the basis of the balance remaining. That would show whether, according to the records, the amounts deducted for expense were in agreement with the items of actual expense, verified by examination of the ledger. In the parlance of that branch of the profession, expenses are taken "off the top" when the amount of the expense is deducted from the gross amount of the settlement and the remaining balance is divided between client and attorney in accordance with the terms (percentage) agreed upon in the retainer. Under a fifty percent retainer, as in these cases, the balance would be distributed equally. On the other hand, the expenses are said to be taken "from the client" when the gross is divided according to the percentage agreed, and the expenses are then deducted from the client's share and returned to the attorney. In order to discover the system here used, the accountant "worked backwards". That is to say, he took the amount of the primary check and multiplied it by two. Then he subtracted the end result from the gross amount of the settlement. That was tentatively assumed to be the amount taken "off the top." That was checked by totalling the amounts shown as distributed and subtracting them

from the gross. If they agreed, the expenses had been taken from the top. In these cases, with errors which will be accounted for, they agreed. The expenses had been taken from the top and the distribution figures had been computed on the basis of the balance remaining. The distribution figures showed the amounts of the smaller checks as going to the clients.

But the clients firmly denied receiving those checks or their proceeds. Yet all had been paid by Respondent's bank (Merchant's Bank of New York) and were admittedly endorsed by the payees. All originals were without any such bank-stamps (20) as would signify that they had cleared through another bank indicating, thereby, that they had been presented directly to Merchant's. Dascoli's endorsement was followed by that of a Valerie Neville, admittedly employed by Respondent at the time. The Campbell original was not available and the photostatic copy does not show the reverse side of the check but there is no dispute that it was paid. The Luckman, Zucker and Groeger endorsements were followed by the inscription "OK for cash D.A. Goldner." The Groeger check was cancelled two days after its date, the Luckman and Zucker checks five days after, and the Dascoli check six days later. So much, for the time being, for the evidence of record. Some general observations should be made as to the witnesses.

The client-attitude was not such as might be expected of the victims of fraud. No one was hostile to Respondent and some attested their original and continuing confidence in the alleged wrongdoer. Respondent categorically denied having falsely represented and deducted the expenses, as charged.

In broad outline, his testimony was that the clients received and kept the smaller checks and kept their proceeds. He denied having received any part of the proceeds, except in one collateral instance (later discussed). In all but one of the cases he had taken the expenses from the clients, and he produced so-called "closing state-

ments" (to which I will hereafter refer as the "yellow sheets") which, he testified, were prepared by him at or about the time of distribution and place before the client, with an explanation of the figures. The clients could, if they chose, keep them. But they didn't. As for expenses shown on the yellow sheets, but not posted in the ledger, he testified that he "worked from the files". I take that to mean (21) that he was guided by memoranda on or in the file, or bills, on which he based the content of his yellow sheet. He didn't keep the ledger himself his accountant did. Where the sum of the primary and smaller checks exceeded the amount which, by his version, would have been the client's rightful share he had, for one reason or another, increased the client's share. As to why two checks instead of one (for the total claimed to have been given the client) he had various explanations not borne out by the clients nor by external circumstances. In some cases the clients were "hungary for cash" as soon as they endorsed the insurance-company check, but until it had cleared, the Respondent's check wouldn't be good for the total amount, so he gave the smaller check for immediate use, since he had enough to cover that one. It was to avert any such complication that the primary check was sometimes dated later than the smaller one. The "OK for cash" inscription was a requirement of his bank, to facilitate cashing by clients who didn't have adequate means of personal identification. An employee would accompany the client, identify him, and the bank would give the client the cash. It was for much the same reason, he speculated, that Valerie Neville had endorsed the smaller check after Dominick Dascoli. She was employed by Respondent at the time. She had, in all probability, gone with Dascoli to identify him. But she was not called as a witness nor was her absence accounted for and that was true of various other witnesses who might have substantiated Respondent's claims. Mr. Conrad (said to have attended the distribution in cases which

he had referred to respondent), was one of them. If he also is a target of investigation that fact was not made to appear of record and is not otherwise known to me. In none of the cases was the client confronted with the yellow-sheet in aid (22) of his recollection of the events at the time of settlement and distribution. In some, they were not cross-examined with reference to the claim later made by respondent, after they had left the Court. In one (Groeger) Respondent claimed that the smaller check had been given the client in accordance with a provision of the retainer, reading: "car damage $500.00 without fee" but the retainer was not used in cross-examination of the client, who had denied recollection of having asserted any claim for property damage. (His accident-report was put in evidence to show that he had.) In that setting, the evidence in the individual cases may be more briefly stated and is thus summarized:

DASCOLI

Dominick Dascoli:—Testified, in substance, that when the case was settled for $6,500.00 Respondent explained how it was to be divided. Dascoli received $3,000.00 (primary) check and its proceeds; Respondent said that it represented Dascoli's share and that the difference of $500.00 was for expenses. Dascolli wasn't given an itemized list of the expenses, but believed Respondent and didn't question him. He was handed the smaller check, to his order, but endorsed and returned it. He did not, and does not, know Valerie Neville, whose endorsement appears below his, nor did she endorse the check in his presence. He was happy when he got his check. He made no complaint then that he was being "short-changed" and he makes no such complaint now. He originally retained Leo Conrad but all dealings thereafter were with Respondent.

Respondent:—Testified, in substance, that he didn't tell the client the expenses were $500.00; actually, Dascoli got $3,500.00 in Conrad's presence (and implicitly, at his suggestion) (23) after Dascoli complained about the expenses and about a loss of earnings on his part. Why two checks? To insure bank-clearance (as already outlined, ante). That was why the primary check was dated three days later than the smaller. The actual expenses were $250.00 (by reference to the yellow sheet). A bill of $100.00 for Dr. Marcus, not shown in the ledger, must have been omitted by oversight. It was deducted at the closing, but someone must have neglected to pay it.

The ledger entries show:—Settlement: $6,500.00: Distribution; to Dascoli, $3,000.00; to Conrad, $1,351.25; to Goldner, $1,648.75, which add up to $6,000.00, plus, to Dascoli, $500.00, for a total of $6,500.00. The items of expenses included $35.00 to Dr. Marcus (Dascoli's personal physician) and totalled $119.50.

The yellow sheet shows:—Fees, $3,250.00, expenses $250.00, deducted from the $3,250.00 for a balance of $3,000.00 to which is added $500.00 (with a note "adj lost salary") for a total of "$3,500—Dascoli." Among the items of expense was a $100.00 item for Dr. Marcus. No evidence of its payment was offered and Dr. Marcus was not called, though he is not named as having been connected with the alleged conspiracies of exaggeration.

It is a noteworthy circumstance that Mr. Dascoli is one of five men who assert that they accepted, without question, the meagre explanation allegedly given by Respondent for taking from them a substantial part of the proceeds of their respective settlements. I do not believe them. And when I get to the Luckman matter I will single out record-evidence which points the other way. But to return to Dascoli, his loyalty to Respondent went to the point of perjury at the Judcial Inquiry, in regard to the

smaller check, and committed in response to a request, by Respondent, that Dascoli lie about the matter. (24) Mr. Dascoli recanted and told the truth when shown the checks and threatened with prosecution, and after he had phoned his wife and talked it over with her. For a person of normal sensibilities, that must have been a harrowing experience, and, according to Dascoli, Respondent was the cause. Yet, unresentful, satisfied when he got his check, still satisfied and disavowing any thought that he was "short-changed", he remained loyal to Respondent at the hearing. Nor does it appear that he even knew Respondent until referred to him by Leo Conrad. Dascoli asserts that he was not, by his judgment, short changed. That, I believe. I conclude that if the words "for expenses" were used, they were "for the record" and nothing more, and that there was neither intention to deceive, nor deception, nor reliance upon that flimsy utterance. There was a meeting of the minds, but neither Dascoli nor respondent revealed the meeting-ground.

LUCKMAN

Stanley Luckman: Testified, in substance, that after a settlement for $5,000.00 he took away a (primary) check for $2,178.50, but that was all he received. He endorsed and returned smaller check for $900.00 to Respondent; he didn't take it with him or receive any part of the proceeds; Respondent merely told him "there were certain expenses and that is all there was for me" and (in answer to a leading question) that he had taken the expenses "off the top." Luckman wasn't given an itemized statement and didn't ask for an explanation of the expenses. He retracted his testimony about any representation as to expenses and that they had been taken "off the top." "He just told me to do him a favor and endorse this check." Luckman didn't question why he couldn't take the smaller check with him. "At the time I was just glad the (25) case

was settled and * * * happy about the whole thing." He didn't ask what Respondent was going to do with the check. He had tried, unsuccessfully, to deal with the insurer himself, before retaining Respondent, but got a "run-around." When he received his (primary) check he was satisfied with that sum. There was no question in his mind as to expenses "off the top" and he recognized that, *whatever it was for,* it was a legitimate disbursement, to the best of his knowledge (he added).

Respondent: Denied falsely deducting expenses of $643.00 etc., and denied that the expenses were only $94.00. He testified, in substance, that, by reference to his yellow sheet, they were $321.50. Luckman actually got $3,078.00, through both checks, because he complained about his share. Two checks were issued because Luckman didn't want his wife to know (presumably, the amount he was really getting. "He had been seeing some girl."). He denied that he had asked Luckman to endorse and return the smaller check, as an accommodation. "* * * Mr. Luckman was a business man." The smaller check was Okayed for cash to facilitate cashing by the payee (same procedure as Dascoli).

The ledger-entries show: Settlement, $5,000.00: Distribution; to Luckman, $2,178.50; to Goldner, $1,921.50, which add up to $4,100.00 plus, to Luckman, $900.00, for a total of $5,000.00. The ledger-entries of items of expense might have covered two companion-cases and totalled $140.75, not broken down by the accountant.

The yellow-sheet shows:—expenses of $321.50, taken from the client's share. They include a total of $270.00 for enumerated items of medical expense. As to why his ledger showed only $35.00 to one of the doctors (Pomerantz) listed for $40.00 in the sheet, Respondent said that he had the bill before him when (26) he made the deduc-

tions and couldn't explain why he was paid less. As to the other doctors, not shown in the ledger, he was working from his files and knew they were paid. No receipted bills nor cancelled checks were offered and none of the doctors was called.

I have no doubt that Mr. Luckman was "happy about the whole thing"—after the amount of his primary check had been negotiated to his own satisfaction. But the record-evidence destroys the atmosphere of implicit trust and unquestioning confidence created by his testimony. Going back to the settlement figures, it is apparent that nine hundred dollars had been taken from the top and the remainder of $4,100.00 had been distributed, unequally. Luckman's share was $257.00 more than Goldner's and, of course, there must have been a reason. Upon the figures, one of two things happened. Either Luckman insisted upon another $128.50 and Goldner yielded the point, or Luckman made a bid for $257.00 and his claim was compromised by splitting the figure down the middle. If the first of these things happened, a sum of $128.50 would have been added to half the balance being distributed and would have been given to Luckman. The result would be $2,050.00 plus $128.50 or a total of $2,178.50, which is what Mr. Luckman got. To Goldner, the result would be $2,050.00 less $128.50, for a remainder of $1,921.50, which is what Respondent got. And, if the second thing happened, the figures would shape up the same way. "Mr. Luckman was a business man." That, I accept. I reject his assertion that he did not question the expenses, if the words "certain expenses * * * off the top" were used at all. I reject his testimony that he just did Respondent a favor and turned back the smaller check without any question as to why he couldn't have it for himself. I accept his acknowledgement that it was for a disbursement (not necessarily legitimate) and reject his implication that he did not actually know what it was for. I conclude that he just didn't disclose the extent of his

knowledge at the hearing. And neither did (27) the Respondent. It follows that there was neither intended deception, actual deception, nor reliance.

CAMPBELL

John Campbell:—Testified, in substance, that after a settlement for $7,000, he received and deposited the primary check, but never received proceeds of smaller ($700.00) check which he endorsed and returned to Respondent. His testimony is more fully discussed after comment on the yellow-sheet.

Respondent:—Denied having represented or deducted $700.00 as expenses; he testified, in substance, that he didn't receive any part of proceeds of smaller check; it was issued because a girl mistakenly informed Campbell, by phone, that the case was settled for $8,000.00 and, when the client learned the correct amount he was disappointed. He complained that Goldner was winding up with a net fifty percent while he (Campbell) had lost $500.00 in car damage, in addition to loss of income (moonlighting fireman) so seven hundred dollars was added to his share, and that is what the smaller check was for. After Campbell had been to the Judicial Inquiry for the first time, he told Respondent that the latter had charged him for doctors he (Campbell) didn't remember seeing. Respondent explained that the doctors had reviewed his X-Rays. "He wasn't a fellow to part with any money without knowing about it."

The ledger-entries show:—Settlement: $7,000.00: Distribution; to Campbell $3,115.00; to Goldner, $3,115.00, which add up to $6,230.00 plus, to Campbell, $700.00, for a total of $6,930.00, leaving $70.00 unaccounted for.

The yellow-sheet shows:—expenses of $385.00, taken from the client's share.

Mr. Campbell was intelligent, alert on the stand, brief (not quite four pages), to the point and chose his words with care. (28) He was not cross-examined as to his principal or supplementary occupation, nor as to the sequel to his appearance at the Judicial Inquiry. Although, on first impression, his testimony suggests ignorance of the purpose of the "expenses" for which $700.00 was taken from him, it is consistent with knowledge of a specific purpose by a witness careful not to betray the fact unless forced to. With an alleged "ten percenter" figuring in the other charges in the specifications, the circumstance that the alleged "expenses" of $700.00 are exactly ten percent of the amount of the Campbell settlement has some significance in its setting. Now note Mr. Campbell's testimony. He wasn't "exactly" given an explanation or written statement as to how the amount of his (primary) check was computed. *As far as he knew,* it was for expenses. That is what he was told (in answer to a leading question). But if Mr. Campbell meant to convey the understanding that he was in ignorance of the reason why a substantial sum of money was taken from him, and that he let it go on the strength of a casual representation that it was "for expenses" I do not believe him. If the words "for expenses" were used, I do not believe that he was intended to be or that he was deceived thereby, nor that he relied on so skimpy an explanation.

He had been referred to Respondent, said Mr. Campbell, by a man down at the collision shop, so it was a first meeting and there was no past relationship, professional, or social, on which blind faith and confidence in the attorney might have rested. Seven hundred dollars is a lot of money in the lives of most of us and there is nothing to show that Mr. Campbell is more fortunate—or less prudent—than the rest of us. And a man of his intelligence and forethought, as evidenced on the stand, with a normal, prudent regard for his own interests, would ask for a more adequate explanation of the reason why he

was parting with one-tenth of his settlement, especially if, as Respondent testified, Campbell found it economically necessary or advantageous to pursue two gainful occupations. But if (29) Respondent told an untruth it remains my opinion that Mr. Campbell did not tell the whole truth which, of course, is much the same thing. I reject the suggestion of his testimony that he was in ignorance of and deceived concerning the purpose of the payment. And I reject Respondent's explanation of the payment.

ZUCKER

Gilbert Zucker: (Gloria was his wife) Testified, in substance, that when the case was settled for $7,000.00 he received and got the proceeds of the $2,983.50 (primary) check but the smaller ($1,000.00) check he endorsed and returned to Respondent; he didn't receive its proceeds. He believed the computation was explained, but recalled no written statement. As to the primary check he "believed" the explanation was "this is the proceeds as a result of the case being settled * * *, words to this effect." and, as to the smaller check and why he had to endorse it over, "Well, something to the effect about bookkeeping. *I really wasn't interested at the time* * * *," He went on to admit perjury at the Judicial Inquiry, allegedly committed by Respondent's procurement.

Respondent:—Denied having falsely deducted expenses of $1,033.00 etc., and denied falsely representing the matter; the substance of his testimony was, that the actual expenses (with reference to the yellow sheet) were $516.50, since discovered to have been erroneous through duplication of an item of $190.00 for Dr. Feder; Zucker did not return the smaller check and Respondent got no part of its proceeds. It was given to increase the Zucker share

because Gilbert Zucker was a nephew of Sam Missler, who referred cases to Conrad, and Conrad (the attorney originally retained) agreed that the Zuckers would get an additional $1,000.00. Why two checks? He couldn't recall, but the talk about Missler (and some murmuring about the expenses) may have occurred after the primary check had been issued.

(30)

The ledger entries show:—Settlement $7,000.00: Distribution; to Zuckers, $2,983.50; to Conrad, $1,491.75; to Goldner, $614.75. plus, to Zucker, $1,000.00 for a total of $6,090.00 But in this case the figures show that *$1,033.00* had been taken from the top, leaving a balance of $5,967.00 for distribution. The Zucker (primary) check is fifty percent and the Conrad check is twenty-five percent of that amount. The ledger entries itemize expenses, totalling $1,033.00, as follows:—*Citroen* (the alleged "ten-percenter") *$700.00;* Dr. Cohen, $20.00; Dr. Feder, $190.00 and Goldner, miscellaneous, $123.00. Therefore, on the basis of the ledger entries, the computation must be made like this:—Settlement, $7,000.00, less $1,033.00 (expenses, actual) leaves a remainder of $5,967.00 distributed:—to Zuckers, $2,983.50; to Conrad, $1,491.75, which add up to $4,475.25 plus, to Zucker, $1,000.00 for a sub-total of $5,475.25, plus (all that was left), to Goldner, $491.75 for a total of $5,967.00. The amount of the difference between the fee booked by Respondent—$614.75—and the remainder left for him to get—$491.75—is $123.00, which is the exact amount of his miscellaneous expenses.

The yellow sheet shows:—expenses of $516.50, deducted from $3,500.00, with a remainder of $2,983.50, under which is the figure 1,000—with a note: "Clients Leo asked favor." No sum is earmarked for Citroen among those listed as items of expense.

This case brings to the forefront *one* reason for a conspiracy of silence which might well extend to and include the others. There is no evidence of any false representation as to expense. The testimony goes "* * * this is the proceeds * * * something to the effect about bookkeeping ***." The detached disinterest in the ultimate disposition of a thousand dollars;—" really wasn't interested at the time", is completely incredible. And the expenses of record were in excess of the $1,000.00 which Respondent is, in effect, charged with having stolen by the use of the false pretense that wasn't made. Among the expenses was an item of $700.00—ten percent (31) of the settlement—for Citroen. I do not believe that Mr. Zucker's knowledge of the bookkeeping was so limited as he stated in his testimony.

As for the respondent, his testimony is rejected. A blueprint is hardly necessary.

GROEGER

Ralph Groeger:—Testified, in substance, that after a settlement for $5,000.00 he received a primary check for $2,193.00 and got the proceeds, but didn't get the proceeds of a smaller check for $500.00 which he endorsed and returned to Respondent. He "thought" Respondent wrote down an explanation and showed it to him. Although he was unable to recall the fact, his accident report (in evidence) claimed property damage of $500.00 and pictures (also in evidence) show extensive damage to the front end of his car.

Respondent:—Testified, in substance, that the client got a total of $2,698.00 by the primary and smaller checks. A notation on the retainer (of Leo Conrad) in the words: "car damage $500.00 without fee", led him to assume that the smaller check was given in accordance with that provision. And, because the smaller check was dated five

days (actually, six) before the larger, he must have issued it because the client wanted money right away.

The ledger entries show:—Settlement, $5,000.00: Distribution; to Groeger, $2,193.00; to Conrad, $1,096.50 and to Goldner, $710.50, which add up to $4,000.00, plus, to Groeger, $500.00, for a total of $4,500.00. But here again, a deduction of $614.00 must have been made from the top to arrive at a distributable balance of $4,386.00. Restoring and adding that amount would give a gross of $5,114.00. The error is accounted for by reference to the items of expense entered in the ledger. They are, Citroen (the alleged ten-percenter again) $500.00 and Goldner miscellaneous, $114.00. The amount of the excess is also the amount of Goldner's miscellaneous expenses. These were verified by the accountant as, actually, $113.80, in connection with which, note the content of

(32)

The yellow sheet: which shows itemized expenses of $113.80, not including nor reflecting any payment to Citroen. To the amount of $113.80 is added "car damage 500—" for a sum of $613.80, which is deducted from 5000—with a remainder of $4,386.20, which is divided by two. The notation continues like this:—

"	2198.10)
Car damage	500—) Groeger"

This is the only one of the five cases in which Respondent took the expenses from the top.

Aside from the obvious fact that the amount of the expenses exceeded the amount of the smaller check in this case, as in the preceding one, there is no evidence whatever of false representation as to expenses. The very first reference to the subject was made by Mr. Groeger when asked the terms of the retainer. He answered "fifty percent less expenses." He was then asked whether, when

he received the primary check, he requested Respondent to "explain what the expenses were." His answer: "I don't think I asked him; I think he explained it to me." Asked whether verbally or in writing, he answered: "I think he wrote it down and showed it to me, but I don't recall it exactly." That was the entire testimony on the subject, (33) and, of course, it does not make out a false pretense. I reject Respondent's testimony, and his yellow sheet, as untrue. The yellow sheet in evidence was not identified by Groeger as the one shown him. He was not asked about it on cross-examination.

SUMMARY COMMENT

It must be evident, at this point, that I am convinced, by the evidence, that Respondent received the proceeds of these smaller checks, but not for his own use, and that the clients were aware of the purpose for which the money was to be spent. The word "bribe" was not used in cross-examining Respondent. He was asked about—but denied—the giving of gratuities in another connection. With specific reference to the smaller checks, the cross-examiner suggested—but Respondent denied—payments to Insurance Company adjusters or employees, in general. "Gratuities" is a polite word, "bribery" an ugly one. There is no evidence of the actual occurrence of either, but the image of Respondent, created by the evidence, is not that of an avaricious man. It is, rather, that of one who spent the clients' money for results. And the clients were grateful for the results and not at all disposed to question that there were obligations to be met.

(34)

BORSACK, GART, GRANAT, and SCHMIDT

Over the objection of Respondent's counsel, evidence of these transactions was received at the hearing. None of them is included in the charge of larceny by false pretense as narrowed in scope (to the five cases just discussed) by the bill of particulars. The evidence was received on the theory that evidence of similar acts is admitted as an exception to the general rule of exclusion when it has true probative value on a present issue, either of (1) the intent with which the act presently under consideration was done or, (2) whether the act was done in pursuance of a single, sustained and continuing scheme and plan. But to serve that purpose they must, of course, have a criminal complexion. Otherwise, they are not other "criminal acts" and contribute nothing to the proof. After reviewing the hearing-record, I am convinced that the other transactions are not themselves shown to have involved criminal conduct, and hence have no value as evidence. Consequently, they bring to the case only the impact of prejudice by suggestion, unproved. Were this a matter in which I had the power of determination, I would strike them from the record. But since my only function now remaining is report and recommendation, the evidence must remain in the record for review by the Court to which this report is rendered and my recommendations made.

For such aid as it may lend in the process of review, the evidence in each of these cases is tersely summarized. Here again, a note of factors and considerations (35) common to all will aid perspective and shorten my address. The accountant's testimony does not cover any of these cases. As a result, there is no evidence of the falsity of Respondent's representation in any case, if he made one and if it was false. Respondent's yellow sheets are in

substantial accord with his version of these matters and, as in the others, I reject his versions and his yellow sheets.

Hyman Borsack:—(Case also covered wife, Ann) Testified, in substance, that the case was settled for $5,500.00. Here two primary checks were issued and the proceeds received by clients. The smaller check for $600.00 was endorsed and returned to Respondent. The client didn't get the proceeds. As for the conversation concerning it:—"Well, he said it was for expenses." Another unperturbed and acquiescent victim.

Respondent:—Testified, in substance, that the client got and kept the smaller check, and he got no part of the proceeds.

The yellow sheet:—shows expenses of $154.00 taken from share of Ann Cohen (Borsack) on a claim settled for $1,000.00, with remainder of $346.00, apparently rounded out to $350.00, but her primary check (in evidence) was for $390.00; expenses of $299.00 taken from share of Hyman Borsack (settled for $4,500.00) with remainder of $1,951.00 and note "600— extra to HB." Hyman's primary check was for $1,951.00.

Stanley Gart:—Testified, in substance, that he retained Conrad but Respondent handled the matter; it was settled for $2,000.00 (actually, $1,995.00, per my examination of the ledger). He received the primary check of $829.60 (36) and its proceeds, but didn't remember a smaller check for $200.00, although he identified his signature (endorsement) and he didn't get the proceeds. He denied having received the smaller check as a result of a complaint by him, that the amount of the primary check wasn't adequate in view of his (Gart's) loss of earnings.

Responent:—Testified, in substance, that he received no part of proceeds of smaller check; it was given to Gart because he had had to wear a jaw-brace and had lost earnings; the different dates meant that there wasn't enough on deposit to cover both checks, etc.

The yellow sheet:—Shows settlement, $1,995.00; client's share $997.50, from which deducted expenses of $167.90; to remainder of $829.60 is added 200—with notation "To cover part loss earnings" after which total of $1,029.60 is struck. Mr. Gart either had a poor recollection or was a reluctant witness.

Ned Granat:—Testified, in substance, that he didn't remember the settlement-figure. His brother-in-law, Lewis Bernstein, who forwarded the case to Respondent, supplied it as $1,750.00. Granat testified that he received the primary check of $800.00 and its proceeds, but that after he endorsed the smaller check for $200.00, someone in the office took it back. He didn't get the cash. He admitted that he owed Bernstein some money but denied telling Respondent to turn the $200.00 over to Bernstein in payment of the debt. "The thing that I heard was it was additional expenses." He testified that Respondent asked him to lie about getting (37) the proceeds, at the Judicial Inquiry. The record shows that he perjured himself in the matter, but recanted. He was of sub-normal intelligence, a reluctant witness and of poor memory. He didn't remember the substance of his judicial Inquiry testimony though he had read it a week before the hearing.

Respondent:—Testified in substance, that Granat (as a result of suggestion by Goldner) said to turn the $200 cash over in payment of the Bernstein debt, and that he did turn it over, as authorized.

Lewis G. Bernstein:—Testified, in substance, that he forwarded the case to Respondent; there was a debt and

he mentioned it to Respondent when he sent the case along; after the settlement, Respondent did give him some cash with a remark indicating that it was against the debt (he also got a forwarding fee) but he wasn't sure of the amount. It might have been one or two hundred dollars.

The yellow sheet:—showed only expenses of $153.00, but not the alleged manner of distribution. Bernstein was interested in Granat through relationship, by affinity, and in Respondent, through profitable business (professional) dealings with him.

Max Schmidt:—(Case also involved wife, Martha.) Neither the Schmidts nor Respondent could recall the amount of the settlement. Mr. Schmidt's examination was conducted with proof of exaggeration of Tendler's medical report as the chief aim. When asked how much he got in settlement Mr. Schmidt, with pass-book in hand, said $970.00. But the primary check (38) was for $870.00. Asked whether he deposited "that check" Schmidt answered:—"I didn't have a check. Cash money." He identified his signature (endorsement) on the primary check. Asked whether he got $870.00 for it, he said: "I only got that money what I deposit in the bank. * * * $970.00. That is all what I remember." He also identified his signature (endorsement) on the smaller check for $680.00 but couldn't remember the conversation when he got it. As to whether he remembered receiving its proceeds:—"altogether what I could tell you here was $970.00 in cash money." And he too, was satisfied with the settlement.

Respondent:—Testified, in substance, that he couldn't recall the amount of the settlement, but the clients got both checks. He didn't get the proceeds of the smaller check: "Never had the money—never touched it."

No yellow sheet was offered in this case.

The next specification advances the second wave of the attack on the primary and smaller check device. It is thus alleged, in substance:

7-q:—That respondent, for the purpose of deceiving Federal and New York State Income Tax Authorities, at various times issued two settlement checks to each of his clients in payment of the latter's share of proceeds of litigation, or claims, but demanded and received from each such client the proceeds of one of such checks without declaring it as taxable income. Petitioner's bill of particulars specifies that the checks were issued at the time of settlement, that the proceeds were received by respondent, personally, (39) and through Valerie Neville Mangino, at his office or bank and (implicitly) that he failed to declare the money, so received, as taxable income for the year 1954, for which he declared a gross income of $54,821.78 but paid taxes on a (declared) net income of $1,793.71. (Par. 4-b, c, d.)

Respondent's counsel protests the consideration of this charge upon the ground that, prior to the taking of testimony at the hearing, there was a stipulation made between him and counsel for Petitioner, that the latter would be bound by the bill of particulars and that the income tax charge would be no part of the proof in this case. (Petitioner's Memo, page 21.) There is no such stipulation of record. There is colloquy about a representation made by the Petitioner's counsel, to that effect. It occurred on the objection of Respondent's counsel to the admission of the accountant's testimony as to the Zucker transaction, wherein the settlement and distribution occurred (by reference to the checks) March 19, 1954. Mr. Markowitz stated, in effect, that the proof was offered to illuminate the matter of the two checks and, on later objection, agreed that he had made a representation of the kind just noted. He then stated that

the purpose of the proof was to show the manipulation of the books. Looking back upon it, the stipulation, if in the terms employed by counsel, would be pointless, since the Petitioner's bill of particulars, as above summarized, charges the offense as having been committed in 1954 when, presumably, Respondent (40) got his fee in the Zucker case. So the proof was admissible under the bill. However that may be, the ultimate reality is, that there is no evidence whatever to support the charge. The income, as alleged in the bill, is not proved. The declarations (Federal and State) alleged in the bill are not proved. The evidence is insufficient to sustain the charge in any event.

I THEREFORE RECOMMEND DISMISSAL of the specifications alleged in this paragraph of the petition.

The next specification has to do with another phase of the conspiracy of exaggeration. In substance, the allegation is,

7-r: That Respondent, in various actions instituted by him as attorney for the respective plaintiffs, prepared and submitted, or permitted preparation and submission of bills of particulars containing false and exaggerated statements which he knew—or, with the exercise of reasonable diligence, should have known—were false and exaggerated, and thereby attempted to and did perpetrate fraud and deceit upon the respective courts, defendants and insurers. Five such actions are specified in the bill of particulars (Par. 5):—

(41)

Title	Court	Insurer
Bernard Rickles v. Nicholas De Fillipo	Supreme, Bronx Co.	Allstate Insurance Co.
Jack Stein v. Charles Goldberg	Supreme, Queens Co.	Employer's Group
Bernard Stoller v. John Rushetsky	Supreme, Kings Co.	Empire Mutual
Dodell v. Jerry Fessler	Supreme, Kings Co.	Hartford Accident & Indemnity
William V. Buscemi v. Nassau Air Conditioning Co.	Supreme, Kings Co.	Aetna Casualty & Surety

(42)

In my opinion this charge is not sustained by the evidence. I THEREFORE RECOMMEND ITS DISMISSAL. My reasons are these:

No evidence at all was offered, or elicited from Respondent, with reference to the bills in the *Rickles, Stoller* and *Rushetsky* cases. In the *Stein* and *Buscemi* cases the nature of the falsity contended for by Petitioner has to be taken from the tenor of the examination of the witness, since it is not specified in the bill of particulars.

In *Stein* v. *Goldberg,* attention was focussed on the plaintiff's claims for loss of time following the accident (one month, and intermittently thereafter) and for medical services and supplies (approximately $265.00). (*6) As previously noted, Stein took refuge behind his Constitutional privilege. His first refusal was evoked by questioning as to his loss of time from business as a result of injuries sustained in the accident. Given time to consult with his attorney, he resumed the stand and testified that he couldn't do his job in full; he lost some time; he didn't

(*6) Pet ex 24, Par. 5 p. 3, verified by Respondent.

think it was a month; he "stood away a couple of days" and the rest of the time went in and did part-time work; he stayed there a little while and went back home. He didn't remember whether he *told* anyone he was disabled for approximately a month following the accident, didn't recall *discussing* his disability, with Respondent, for the purpose of drawing up a bill of particulars, nor did he remember discussing, with him, how much he had paid in doctor's bills. As to whether he had *spent* any money for medical bills he again invoked his privilege and, on the same ground, refused to answer whether he had ever *told* anybody that he had spent $265.00 for physicians' services and medical supplies. Shown a copy of the bill, he professed inability to recall having seen it before. On his part, Respondent denied knowledge of exaggeration, if any such thing had happened.

(43)

He testified that the information as to the injury itself had been obtained from a report (in his file) rendered by a Doctor Leo Green, to whom Stein had been referred by Doctor Gardstein. The information as to the loss of time was obtained from the client and the information as to the medical expenses, from bills rendered by the treating physician (Gardstein), Doctor Green and others, including X-Rays, and pretty much coming out to the amount claimed in the bill (handed to Mr. DiBiasi). Except that Respondent paid Doctor Gardstein for a report, Stein himself paid the latter's bill. In short, the information was obtained either from the client or the doctors, and there is no evidence to show that Respondent knew, or should have known, that the information on which he relied in preparing the bill was false.

In Buscemi v *Nassau* etc., the plaintiff's bill of particulars claimed a total of $496.00 for medical service

and supply, of which, $286.00 was for services. It also made a claim for four weeks loss of time (confined to home and bed) immediately after the accident, and a day or two at various intermittent times "since then", resulting in a loss of earnings for three weeks. (*7) Buscemi's testimony, and his talents, have previously been dealt with at length and need not be reviewed again here. The gist of Respondent's testimony was that the information was obtained either from the client, the employer or the doctor and there is no evidence to show that he knew, or should have known, that the information, incorporated into the bill, was false.

By the next specification, it is alleged, in substance:—

7-s: That Respondent conspired and arranged with various persons to solicit, and to procure through solicitation—directly and indirectly—, legal work and retainers authorizing him to render legal services, in violation of the provisions (44) of Section 270-a of the Penal Law and (the precepts of) Canon 28. The specification is couched in the terms of the Penal Law section. By his bill of particulars (Par. 6-a) Petitioner names Sam Gabrielle and Michael W. Castoro, an Allstate adjuster, as the co-conspirators and alleges (Par. 6-b) that they, respectively, solicited John Campbell (Gabrielle), Helen Thompson, Harry Ketcham and Hazel Cohen (Castoro) to retain Respondent.

In my opinion, the evidence does not support this charge, and I THEREFORE RECOMMEND ITS DISMISSAL. My reasons are these:

The essence of the offense is solicitation or procurement, personally, or through another, acting as agent. The agency-provision accords with the fundamental law of conspiracy, by which, the actor alone is answerable for his acts unless he has been incited thereto (counselled,

(*7) Pet Ex 1, p. 2, par 5; Id., pp. 3, 4, pars. 6, 7.

commanded, induced or procured) by the accused. In other words, there can be no conspiratorial arrangement, as alleged in the petition, unless there has been a combination in an agreement to do the unlawful act. The agreement can, and most often must, be established circumstantially, but the knowledge of the accused and his concurrence in the criminal purpose must be shown or the accusation will fail. Here again, evidence of similar transactions, when available, will have a value on the issues of knowledge and concurrence. But the difficulty with this case is, that there is evidence of but one case of *solicitation*, as distinguished from bare referral, and no evidence that the Respondent had any connection with the *solicitation*. That is the Ketcham case.

Mr. Harry Ketcham testified that, after an accident on November 24, 1954, he reported the matter to his insurer, Allstate. By appointment, he was visited at the Navy-Yard by Michael Castoro, an Allstate adjuster. Ketcham and his two passengers, Tony Fuschetto and John Marzano, were interviewed by Castoro who, after getting the facts, asked whether they had an (45) attorney. They told him they did not. He then asked whether they were interested in an attorney and, when they answered in the affirmative, he gave them Respondent's name, address and telephone number. They, by appointment, went to see Respondent who accepted Fuschetto and Marzano as clients but told Ketcham he would have to get another lawyer, since he was the driver and the passengers could sue him. Ketcham eventually went to Leo Conrad. He doubted that Respondent sent him there. There is no dispute that Castoro was, at the time, a duly licensed New York attorney but, it should be added, attorneys are not exempt from the law of solicitation. Contrariwise, they are its prime target.

Respondent testified that Ketcham, Fuschetto and Marzano had been referred to him by Castoro. There is no evidence that he had any knowledge of the act of solicita-

tion in this or in any other case. Indeed, there is no evidence of solicitation *in* any other case. All that appears is, as admitted by Respondent—who alone supplied the evidence—that Helen Thompson and Hazel Cohen, the other two persons named in Petitioner's bill, had been *referred* to him by Castoro. They were not called as witnesses. There is no proof that they were solicited. Respondent, under cross-examination, testified that he had known Castoro since about 1953 or 1954 but couldn't recall how the acquaintance came about. From then, until the time of the hearing, he wasn't sure how many cases Castoro had referred to him, but it was probably under a dozen. His contention was that Castoro worked on the cases with him and was paid, as would be any other attorney who shared the work and the responsibility. But, he continued, he never sued a defendant covered by Allstate, in any case referred to him by Castoro. In one of the cases, Castoro had referred his own client to Respondent. The client, in turn (he couldn't remember the name) recommended a Jennie Pagano and one Corbino to Respondent. They were considered as referred to Respondent, by Castoro, to avoid (46) suspicion of client-stealing. The evidence of the other transactions, as elicited from the Respondent, gives no aid to Petitioner's case. It may be that Castoro solicited all whom he referred to Respondent, but if so, there is no proof of it. Only suspicion. The other case specified in the bill of particulars is that of John Campbell, who also figured in the false-representation charges.

On this phase of the case Mr. Campbell testified that, after the accident, he went to a collision shop, where he had a friend, and "they gave me Mr. Goldner's name." Whether Campbell asked his friend about a lawyer, or whether the information was volunteered, and if so, under what circumstances, was not made to appear.

The next two specifications were abandoned by Peti-

tioner at the conclusion of the hearing. The substance of the intendment of the allegations of each is, respectively:—

> 7-t:—That respondent, in pretended obedience to Special Rule 4-A of the Appellate Division, First Department, filed with that Court falsified statements of retainer in personal-injury actions, in actual violation of that rule, and otherwise attempted to defraud and mislead the said Court by such filing, and,
>
> 7-u:—That Respondent, in violation of the provisions of Special Rule 4-A of the Appellate Division, First Department, failed to file with the said Court statements of retainer in matters in which he was retained.

There is, concededly, no evidence to support these charges. I THEREFORE RECOMMEND THEIR DISMISSAL.

(47)

It is next alleged, in substance:

> 7-v:—That, in violation of Special Rule 4-B of the Appellate Division, First Department, Respondent failed to provide clients with statements relative to the settlement and disposition of their cases. The bill of particulars (Pars. 8-b, c) alleges that he provided none of his clients with such statements.

In my opinion, the evidence establishes Respondent's guilt of this charge, but not in all of the cases specified in the bill of particulars. My recommendations are deferred until the end of this report. My opinion is based upon:

(1) The testimony of Hyman Borsack, John Campbell, Dominick Dascoli, Stanley Luckman and Gilbert Zucker, that they were given no written statements by Respondent. Whatever other conclusions have been or may be expressed concerning their testimony, I accept that part.

(2) Complete omission to deal with the matter in the testimony of Ned Granat, Max Schmidt and Martha

Schmidt, and failure of recollection by the witness Stanley Gart.

(3) The testimony of Ralph Groeger who, while not professing to have certain recollection of the matter, thought that Respondent gave him a written and verbal explanation of the expenses, without request.

I hold that the applicable rule, having been laid down for the obvious purpose of keeping counsel in particular, and the administration of justice in general, above reproach, compliance therewith may not be waived by the client, but neither need the statement he pressed upon him so as to require him to retain it. Finally, my conclusion as to the Groeger matter is limited to the fact that the client was given *a* written explanation, but not the yellow-sheet put in evidence by Respondent.

(48)

By the next specification it is alleged, in substance:

> 7-w:—That in violation of Special Rule 4-E of the Appellate Division, First Department, Respondent failed to file with said Court closing statements relative to the settlement and disposition of negligence matters based on contingent-fee arrangement. By the bill of particulars, it is alleged that Respondent failed to file any such statements. (Par. 8-b, c)

All of the transactions proved at the hearing occurred prior to the date when this rule took effect. I THEREFORE RECOMMEND DISMISSAL of this specification.

The substance of the next specification is:

> 7-x:—That Respondent divided his fees for legal services with other attorneys, who had neither performed any services nor assumed any responsibility in connection with the matters wherein the fees were earned and that he thereby violated the precepts of Canon 34. The bill of particulars alleges that Respondent shared his fees with Leo Conrad in the matters of Ralph Groeger, Lee Milford Vaughn and Dominick Dascoli, and with Michael Castoro (in the

matters of) Hazel Cohen (Helen) Thompson and (Jennie) Pagano. (Par. 9)

In my opinion this charge is not sustained by the evidence, and I THEREFORE RECOMMEND ITS DISMISSAL. My Reasons:

The canon interdicts a division of fees without a division of services and responsibility in the matter, but the (49) evidence fails to show that such was the case in the transactions specified in the bill of particulars. The first three involved Leo or Leon Conrad. It is not disputed that Respondent shared his fees with Conrad in the Groeger and Dascoli cases, although there is no evidence touching the Vaughn matter. Respondent testified that in all cases sent to him by other attorneys, he paid them, but for sharing the responsibility and working on the case. He had previously testified, with specific reference to the Schmidt case, that Conrad had participated in the preparation and discussion of various papers and pleadings. Elsewhere, he testified that Conrad attended and participated in the closing out of the matters after settlement. Not that Respondent had any burden of disproving allegations unsupported by evidence. But he did give his evidence and it is the only evidence in the case, since, as previously noted, Mr. Conrad was not called. Neither was Michael Castoro.

The only proof of the Cohen, Thompson and Pagano transactions is in the testimony of Respondent, elicited on cross-examination. His sharing of fees with Castoro in these matters is admitted. But he testified that Castoro came into the office, looked at the medical, discussed what should be done in the cases and shared the work and responsibility. Mr. Castoro's absence was not accounted for.

The next specification charges, in substance,

7-y:—That respondent simultaneously represented clients whose interests were antagonistic to and in

conflict with each other, in violation of Canon 6. The conflict is identified by the bill of particulars (Par. 10) as involving William V. Buscemi, a passenger, and Benedetto Giliberti, the owner and operator of the car in which both were at the time of the accident.

(50)

In my opinion this charge is not supported by the evidence. I THEREFORE RECOMMEND ITS DISMISSAL.

The canon dictates that it is the duty of a lawyer, at the time of retainer, to disclose to the client all the circumstances of his relations to the parties, and any interest in, or connection with the controversy, which might influence the client in the selection of counsel. It is declared to be unprofessional to represent conflicting interests, except by express consent of all concerned, given after a full disclosure of the facts. The only evidence in the case shows that this precept was honored.

Respondent testified that he had been put in touch with Mr. Giliberti through one of the latter's friends, who communicated with Respondent's sister. By telephone appointment, Respondent went to see Giliberti, at his pharmacy, where Buscemi was employed. The facts were learned. As a passenger Buscemi, naturally, was a witness. When he asked if Respondent would represent him too, Respondent agreed, but gave both men to understand that, for tactical reasons which he outlined in view of the operator-passenger status, Giliberti's case would have to be processed first. He explained to both how he would handle it, Giliberti first and, when he got through with that, he would handle Buscemi's claim. Accordingly, nothing was done on Buscemi's claim until Giliberti's had been settled in July. In August, Buscemi was brought to Leon Siken's office and Siken's name was used, dummy-wise, as attorney of record. This was done to avert a prejudice which Respondent supposed would visit Buscemi if the insurer found that Respondent was also representing the passenger. In some features of his testimony, Respondent is confirmed by Buscemi.

Buscemi agreed that Respondent had come to see Giliberti and that he knew that Respondent had engaged to represent Giliberti. On one hand, he said, that there was no talk, at that time, of using another lawyer's name and that he didn't hear of (51) Mr. Siken until later. On the other hand, he agreed that Respondent had said, at one time or another, that it "might be advisable to use another lawyer's name." Moreover, it was not until some two or three months after the first interview that *he* got in touch with Respondent about handling the case (the retainer was signed on the first interview) and he was "almost sure" that by then, Respondent had settled Giliberti's case. Thus, by prior agreement made after full and fair disclosure, Respondent did not actively represent Buscemi until a question of conflict no longer existed, and in any event both parties concerned were aware of the situation and expressly agreed. By Buscemi's own acknowledgement, he did not press Respondent for action until the Giliberti matter was over and done with.

The next specification alleges, in substance,

> 7-z:—That Respondent divided fees for legal services with persons other than lawyers, for services rendered by such persons in the settlement of legal claims or suits, in violation of Canon 34. One such person is named by the bill of particulars. (Par. 11) He is James Citroen.

In my opinion, the evidence establishes the Respondent's guilt, as charged. My recommendation is deferred until the end of this report.

The only issue of fact presented here, is whether Respondent, when he admittedly divided his fees with Citroen, knew that he was not a lawyer. He contends that, in good faith, he believed Citroen to be a lawyer. On that issue I find against him. Five checks in payment to Citroen were put in evidence. Three of them I put out of the case as not constituting a division of fees, and I consider them only on the question of Respondent's knowledge (52) of Ci-

troen's status as a layman. As to the payments evidenced by the other two checks, Petitioner's case is convincingly proved, it being stipulated that Citroen is not now and never was a lawyer.

Respondent's testimony was, that he hadn't known Citroen long; he employed and paid him in the Zucker case which, by reference to the settlement-checks, was closed out on March 19, 1954; he had been recommended by someone, not named, and Respondent had heard from other lawyers that Citroen was a lawyer. He understood that Citroen had done business with the most reputable firms in New York, but couldn't remember the firm-names; he couldn't remember whether he consulted the phone book for the number but, in any case, he communicated with Citroen, who represented himself to be a lawyer and, as far as Respondent knew, he was a lawyer. As for the nature of Citroen's services, he helped prepare and settle the cases. He didn't draw pleadings, but arranged physicals and discussed medical aspects, bills of particulars, etc. He didn't sit in on pre-trial sessions nor was he trial counsel. He never went into a court-room with Respondent to participate in any trial or court procedures. He was paid out of Respondent's fees, but "not any percentages." And the "client paid no part of that." Respondent didn't think that there was any ten-percent arrangement but, if there was, there were other reputable counsel whom he also engaged on a retainer-plus-ten-percent basis. On the issue of Respondent's knowledge, all five checks are now considered.

The Zucker case, it will be recalled, was settled for $7,000.00. The ledger showed check #5204, (dated a week before the settlement checks) to Citroen's order, for $700.00, as being charged to that case.

The Groeger case, as will also be recalled was settled for $5,000.00. The ledger showed check #6290, (dated one day before the smaller check) to Citroen's order, for $500.00, as being charged to that case.

(53)

There was put in evidence a photostatic copy of a check #7617, dated May 31, 1955, to Citroen's order, for $950.00, earmarked as issued in the case of *Thompson v. Potonides.* It was subsequently stipulated that it had been identified with check-stubs showing payments to each of four plaintiffs in a total sum of $4,705.00. It was also stipulated that Respondent's was a fifty percent retainer in that case; that, in his ledger, he credited himself with fees of $800.00, $755.00, $1,000.00 and $2,150.00 respectively (which add up to $4,705.00) and that the stub of the Citroen check was also earmarked in the Thompson case.

There was also put in evidence another photostat, of a check #9235, dated March 23, 1956, to Citroen's order in the sum of $575.00. Here, it was stipulated that the stub showed a deposit of $5,750.00 in a Levenstein matter, with check #9235 charged to the same matter.

There was also put in evidence a fifth check, #7010, dated March 23, 1956, to Citroen's order in the sum of $700.00. This check has not been identified with any specific transaction. The ten percent standard of compensation is evident. Perhaps, as Respondent contends, he did engage counsel on a fee plus ten percent basis. But admittedly, Citroen never set foot in a court-room. He was not an attorney, and I am convinced that Respondent knew it. The two transactions considered on the issue of fee-division are those involving the Levenstein matter and the unidentified transaction shown by check #7010, for $700.00. The Zucker, Groeger and Thompson cases were not considered on that issue because the figures show that the Citroen payments (or expenses including his payment) were taken from the top and not from the fees. Respondent's testimony to the contrary is rejected.

(54)

By the next specification it is alleged, in substance,

> 7aa:—That Respondent wilfully procured and induced clients and witnesses to testify falsely at hearings being conducted, by an Additional Special Term of the Supreme Court, into the conduct of attorneys and others. Petitioner's bill of particulars names nine such persons and alleges that Respondent told them to state that they had received the proceeds of certain checks issued in their respective names when, in truth, they had not and when, in truth, the proceeds thereof had been received by Respondent. (Par. 12)

As developed at the hearing, the core of the charge is that Respondent procured the clients to falsely testify that they had received the smaller checks and their proceeds. Of the nine persons named, six must be culled as having given no evidence in the area. They are John Campbell, Hyman Borsack, Ann Borsack (not called), Bernard Rickles (not called), Bernard A. Stoller (not called), and Stanley Luckman. Those who did testify on the subject were Ned Granat, Dominick Dascoli and Gilbert Zucker.

In my opinion the evidence sufficiently establishes Respondent's guilt of having induced and procured Dominick Dascoli and Gilbert Zucker to testify falsely, as charged. My recommendation is deferred until the end of this report.

Respondent's guilt depends upon the testimony of admitted perjurers and, of course, a conclusion of guilt is insupportable without external corroboration. In the Granat case it is lacking and there is evidence in the testimony of Lewis Bernstein, an attorney not involved in this proceeding, that Granat was indebted to him and that a sum was paid, by Respondent, to the attorney, in payment of the debt. Respondent's testimony was to the same (55) effect. There is a brother-in-law relationship

between the attorney and Granat and, while the attorney had profitable business dealings with Respondent he also has ties of affinity with Granat. Granat denied having authorized Respondent to pay the sum of the smaller check over to his brother-in-law, but as the record will disclose, he had a poor memory and otherwise seems to have a sub-normal mentality. Most of his examination was by leading questions and, when not led, some of his responses failed to meet the questions asked. They answered matters previously inquired into. Of course, Respondent may have taken too much upon himself in handing over Granat's money in payment of the debt, but the charge is perjury and, even though the prudence of the action might be doubted, or even the authority, corroboration of the perjury charge would have to be found in perjury, committed by Respondent and, by Mr. Bernstein, through Respondent's procurement. The only matter of doubt in Mr. Bernstein's testimony was the amount. It might, he said, have been one or two hundred dollars, but he couldn't be sure. I resolve the doubt in Respondent's favor.

Neither Dascoli's testimony, nor that of Zucker, needs to be considered at any length. Each admitted having perjured himself by testifying, at the Judicial Inquiry, that he had received the smaller check, kept it and got the proceeds. Each said, in substance, that Respondent induced him to so testify. Dascoli recanted after he had been threatened with perjury and after he had telephoned his wife and talked it over with her. Zucker let his perjury lie, unconfessed, until Petitioner began preparation for the institution of this proceeding. Meanwhile, he had compounded it with a false affidavit. His remorse is quite apparent from the record. It was even more so in the court-room. I have freely used the word perjury, implying a finding that these two men did testify falsely before the Judicial Inquiry, as just indicated, and I do so find. There is no dispute that they testified to the

effect just described, and the evidence convinces me that neither of them kept the smaller checks nor received the proceeds. (56) I believe the testimony of each, that Respondent procured him to testify to the contrary. The required corroboration has been supplied by the respondent himself.

An important aim of the Judicial Inquiry was to discover where the smaller checks and their proceeds had gone. It seems obvious that the purpose was to open the path to further investigation and weed out wrongdoers in various areas. A variety of offenses was suggested by the tenor of Respondent's cross-examination in the instant case. He denied all of them. The aim of the perjury committed at the Judicial Inquiry was, just as plainly, to thwart discovery of where the checks had gone and who had gotten the proceeds. The accomplices are corroborated by evidence that Respondent fabricated evidence to avoid a visitation of justice for the subornation and thereby evinced consciousness of his guilt of that crime. Reference has already been made to the yellow sheets which Respondent put in evidence on the hearing. He testified that they were prepared and placed before the clients at the closing. Not once was the sheet used in cross-examination of the client to whose case it referred. But that is not all.

In the Dascoli case, as will be recalled, the Ledger-entries and the distribution figures showed that the expenses had been taken from the top, before distribution. In that respect, it was in accord with the system of computation used in all other cases proved. The *Thompson* case (page 38, ante) was figured the same way. But in the yellow-sheet, the expenses were taken from the client and they included items not shown in the ledger. And, by more than coincidence, deduction of the expenses from the client's share gave the same net as shown to have been paid by the primary check. Dascoli, it will be recalled, had no complaints, then or now. *He was satisfied*

with his $3,000.00, as he agreed on cross-examination. But the yellow sheet shows that he got an additional $500.00 as "Adj—lost salary." His statement that he was satisfied was accepted, on cross-examination, without challenge. And then (57) Respondent produced his yellow sheet and testified that there had been a complaint which occasioned the $500.00 increase.

In the Zucker case the same things happened. Ledger-entries and distribution figures show expenses taken from the top, including Citroen. The yellow sheet shows them taken from the clients in a lesser amount, Citroen excluded, with numerous items not shown in the ledger. But by the same more-than-coincidence, the total of the expenses, when deducted from the client's share of one-half of the gross, makes the same primary amount paid to Zucker. And, though Mr. Zucker "really wasn't interested at the time", the yellow sheet shows that $1,000.00 was added to his primary check:—"Clients—Leo asked favor." Respondent's testimony ran in the same direction.

I find the yellow sheets to have been fabricated to frustrate discovery of the truth as to where the smaller checks and their proceeds had gone, both in the *Dascoli* case and the *Zucker* case and, were there any point to it, in all of the others. But the others are not needed to negate inadvertence or mistake in the Dascoli or Zucker yellow sheets. Respondent excluded that possibility, under oath. In that case, the yellow sheets are good evidence of a comprehensive scheme and plan to conceal the actual disposition of the proceeds of all of the smaller checks and thus defeat the purposes of the hearing. I find that Respondent committed perjury by falsely testifying that his yellow sheets were records made in the regular course of the transactions concerned and that they were displayed to the clients, and by falsely testifying that the clients had kept the checks and received the proceeds. Neither was true. If such yellow sheets were in fact employed by Respondent as a regular device in the settle-

ment of every client's negligence case, it is most singular that Respondent, ably represented by most astute counsel, did not seek to buttress his testimony by producing the files of every case settled by him during the periods in question and exhibiting the presence therein of such yellow settlement sheets. That omission speaks volumes.

The next specification charges, in substance,

(58)

> 7-bb:—That Respondent attempted to impede—and impeded—the administration of Justice by wilfully procuring and inducing clients to ignore subpoenas requesting their appearance at hearings of the Additional Special Term.

In my opinion this charge is not supported by the evidence. I THEREFORE RECOMMEND ITS DISMISSAL.

In this case, I accept, without reservation, the testimony of William C. Mattison from which it appears that a jurisdictional issue was an open and moot question right down to the second week of September 1958, and that there was an understanding between counsel, that witnesses were not to be pressed for attendance until the question had been decided. I hold that any advice accordingly was given, in good faith, consistently with that understanding, and does not involve Respondent in guilt of the offense charged.

The next specification is alleged in Paragraph 7-cc: of the Petition. It need not be summarized farther than to say that, as narrowed by the bill of particulars, it charges Respondent with Subornation of perjury, in that he procured and induced William V. Buscemi to testify falsely in the matter and along the lines discussed earlier in this report (pages 4 to 10 ante.).

I RECOMMEND ITS DISMISSAL. Beyond a reiteration of the fact that Buscemi is not corroborated, comment seems unnecessary in view of the prior content of this report.

The charge made by Paragraph 7-dd: of the Petition,

is in substance, that Respondent failed to maintain a respectful attitude toward various courts. (Bill of particulars, Par. 15). It is wholly without evidence to support it. I RECOMMEND ITS DISMISSAL.

The charge made by Paragraph 7-ee: of the Petition, is in substance, that Respondent agreed with clients to bear the expenses of litigation, without reimbursement.

(59)

It is, in my opinion, unsupported by the evidence. The clients named in the bill of particulars are Rickles, Campbell, Zucker and Stoller. Rickles and Stoller were not called, Campbell and Zucker testified to no such agreement and Respondent denied it.

I RECOMMEND ITS DISMISSAL.

The charge made by Paragraph 7-ff: of the Petition, is in substance, that in the prosecution of various claims, Respondent prepared or permitted preparation of statements which he knew or should have known were false and exaggerated, etc., with intent to defraud insurance companies, etc. The offense is alleged to have been committed in all cases. (Bill of Particulars, Par. 17). This is, in effect, an inferior degree of the offense charged in Paragraphs 7-a to 7-j of the petition, already dealt with in this report. In my opinion it is not sustained by the evidence. I THEREFORE RECOMMEND ITS DISMISSAL.

The charge made in Paragraph 7-gg: of the Petition is, in substance, that Respondent grouped claims in violation of applicable Special Rules and Precepts of the Canon of Ethics. It was abandoned by Petitioner at the conclusion of the hearing, there concededly being no evidence to support it.

I RECOMMEND ITS DISMISSAL.

(60)

CONCLUSIONS AND RECOMMENDATIONS

Conscious of the impact which an adverse recommendation by me may have upon the Respondent's professional career, I have assumed the task assigned to me by this Court with prayerful consideration and with a view towards resolving every reasonable doubt in Respondent's favor. I believe that I have done so. In spite of such an approach and a predisposed reluctance to look favorably upon charges thrust on a member of the Bar I have been forced to the conclusion

1. That the "Respondent failed to provide clients" in some instances "with statements relative to the settlement and disposition of their cases" as required by Rule 4-B of the rules of the Appellate Division First Department. (Charge 7-v, dealt with at p. 47 of this report)

2. That "Respondent divided fees for legal services with persons other than lawyers for services rendered by such persons in the settlement of legal claims or suits in violation of Canon 34", to wit, with one James Citroen. (Charge 7-z, dealt with at p. 51 of this report)

3. That "Respondent wilfully procured and induced clients and witnesses" specifically Dominick Dascoli and Gilbert Zucker "to testify falsely on hearings being conducted by an additional Special Term of the Supreme Court into the conduct of attorneys and others" and more specifically "that Respondent told them to state that they had received the proceeds of certain checks issued in their respective names when, in truth, they had not". (Charge 7-aa, dealt with at p. 54 of this Report) and,

4. That Respondent committed perjury before me in his testimony with reference to the so-called "yellow sheets" and the alleged retention by his various clients of the proceeds of the "smaller" checks herein dealt with

by reason of which he is unfit to remain a member of the profession of the Law.

(61)

I should add that if Items 1 and 2 above were alone involved I would recommend that the punishment to be imposed upon the Respondent be a severe censure.

Most respectfully submitted,

Dated: March 6, 1961

J. IRWIN SHAPIRO
Acting Justice of the Supreme Court

Memorandum Opinion of Appellate Division

PETITION OF EDWARD S. SILVER, DISTRICT ATTORNEY OF THE COUNTY OF KINGS, PURSUANT TO SECTION 90 OF THE JUDICIARY LAW, PETITIONER v. DAVID A. GOLDNER, AN ATTORNEY AND COUNSELLOR AT LAW, RESPECTIVELY

SUPREME COURT, APPELLATE DIVISION 2d Department 15 A. D. 2d 558, 222 N.Y.S. 2d 854 (Dec. 27, 1961)

Memorandum by the Court:

"In a disciplinary proceeding against respondent as an attorney and counsellor at law, petitioner moves to confirm the report of the Special Referee.

"Motion granted; respondent disbarred and his name ordered to be struck from the roll of attorneys.

"In our opinion, the charges enumerated below upon which the Referee found respondent guilty, are amply supported by the record and show clearly his unfitness to remain a member of the Bar. These charges are:

(a) failure to provide clients with statements relative to the settlement and disposition of their cases; (b) division of fees for legal services with persons other than lawyers; (c) subornation of perjury; (d) perjury committed upon the hearings before the Special Referee.

"In our opinion, respondent's guilt of charges (a) (b), and (c), supra, is sufficient to warrant his disbarment without consideration of his guilt on the fourth charge, (d). However, his guilt on such fourth charge leaves no question as to the nature or extent of the discipline here required. When an attorney has deliberately attempted by perjured testimony to escape the consequences of his misconduct, he is no longer fit to remain a member of the profession (Matter of Sidman, 268 App. Div. 1040, 52 N.Y.S. 2d 286, leave to appeal denied 294 N.Y. 645, 60 N.E. 2d 551; Matter of Smith, 148 App. Div. 291, 295, 132 N.Y.S. 304; Matter of Thorn, 164 App. Div. 151, 149 N.Y.S. 507).

"A further hearing is unwarranted. The record amply sustains the findings of the Special Referee, without resorting to any alleged extra-judicial checking of the so-called "yellow sheets".

Beldock, Acting P.J., and Christ, Pette and Brennan, J.J., concur.

Kleinfield, J., not voting.

Order of Affirmance of Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 26th day of March in the year of our Lord one thousand nine hundred and sixty-four, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR March 26, 1964.

2

No. 445

In the matter of

EDWARD S. SILVER, District Attorney, Kings County, pursuant to Section 90 of the Judiciary Law,

Respondent,

vs.

DAVID A. GOLDNER, an Attorney and Counsellor at Law,

Appellant,

BE IT REMEMBERED, That on the 12th day of December in the year of our Lord one thousand nine hundred and sixty-three, David A. Goldner, an Attorney and Counsellor at Law, the appellant in this cause, came here unto the

Court of Appeals, by Frederick B. Boyden, his attorney, and filed in the said Court Notices of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Edward S. Silver, District Attorney, Kings County, pursuant to Section 90 of the Judiciary Law, the respondent in said cause, afterwards appeared in said Court of Appeals pro se.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Frederick B. Boyden, of counsel for the appellant, and by Mr. Stanley M. Meyer, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

Wherefore, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well as Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 26, 1964.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON
Clerk.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 415

DAVID A. GOLDNER,

Petitioner,

v.

EDWARD S. SILVER, District Attorney,
Kings County, State of New York,

Respondent.

BRIEF OF THE NEW YORK STATE ASSOCIATION OF TRIAL LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

HERMAN B. GERRINGER,
Counsel for Amicus Curiae,
New York State Association of Trial Lawyers,
165 Broadway,
New York 6, N. Y.

IN THE

Supreme Court of the United States

October Term, 1964

No. 415

DAVID A. GOLDNER,

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EDWARD S. SILVER, District Attorney,
Kings County, State of New York,

Respondent.

BRIEF OF THE NEW YORK STATE ASSOCIATION OF TRIAL LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

The Interest of the *Amicus Curiae*

The New York State Association of Trial Lawyers is a self-governing bar association with a membership of 3,500 New York lawyers who practice particularly in personal injury law. It is the New York affiliate of the American Trial Lawyers Association, successor to the National Association of Claimants' Compensation Attorneys with a national membership of some 17,000 members.

The *amicus curiae* believes that the decision below raises serious questions as to constitutional limitations upon the conduct of judicial inquiries into the professional conduct of attorneys. These questions, we submit, go to the heart of the right to engage in the practice of law which must concern the bar and the public and require their resolution by this Court in this case.

We take no position upon the guilt or innocence of the petitioner with respect to the charges upon which he was

disbarred by the Court below. The larger question as to the denial of due process in the inquiry which led to the disbarment is our primary concern as a bar association. We agree whole-heartedly with this Court's observation in *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 273:

> "A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms to obtain that goal."

Statement of Facts

Petitioner was subpoenaed in November, 1957, to appear before a judicial inquiry into the conduct of attorneys ordered by the Appellate Division, Second Judical Department of New York. The subpoena required him to produce at the inquiry all of his personal and business records, bank books, check stubs, tax returns and cancelled checks covering the years 1953 through 1956 (S.R. 118-129).* The subpoena was complied with and the petitioner testified on two occasions before the inquiry in May and June, 1958 (S.R. 33, 84). Subsequently, charges of misconduct were filed against the petitioner based largely upon the records subpoenaed as above noted. A hearing was held on these charges in 1960. In the three year interval between the issuance of the subpoena and the hearing, repeated efforts by the petitioner to have his books and records returned to him so that he might prepare his defense to the charges against him met with no success. He was compelled to meet the charges without his records and despite his objections on the ground that the seizure and detention of the records violated his constitutional guarantees against illegal and unreasonable search and seizure and a denial of due process (S.R. 75-83). The Appellate Division nevertheless ordered his disbarment and the New York Court of Appeals affirmed without opinion (15 App. Div. 2d, 558, App. B-70).

---

* References are to the Appendices attached to the petition for certiorari.

Argument

The question that emerges with striking urgency from the facts is whether petitioner was denied the fair treatment required by the due process clause of the Constitution and was subjected to an unlawful search and seizure in violation of the Fourth and Fifth Amendments.

It seems clear enough that compulsory production of private papers by subpoena is a search and seizure within recognized constitutional definitions. *Boyd* v. *United States,* 116 U. S. 616. Nor are broad and roving general searches for evidence looked upon beningnly by this Court. See, for instance, *Marron* v. *United States,* 275 U. S. 1922. A broader and more roving search than the subpoenaed bank and personal records of the petitioner here can hardly be imagined. Moreover, the compulsion to deliver his records pursuant to the subpoena in view of this Court's affirmance of the "duty to co-operate" with a judicial inquiry in *Cohen* v. *Hurley,* 366 U. S. 17, left him no choice in the matter and can certainly not be deemed a waiver of the petitioner's rights.

Most significant of all, in the conduct of the judicial inquiry here, is the refusal of the inquiry to return the petitioner's books and records to him during the entire three year period between the subpoena and the hearing. This refusal and the consequent necessity for petitioner to defend himself without the opportunity to see his own records constitutes a denial of due process under the Fourteenth Amendment which in our view requires a reversal of the judgment below. It is hardly necessary to point out that due process requires the opportunity to prepare a defense to charges whether they be criminal in nature or in administrative proceedings. *In re Oliver,* 333 U. S. 257; *Greene* v. *McElroy,* 360 U. S. 474.

We submit that the profession of the law is too valuable to be placed in jeopardy by such arbitrary procedures.

There are few professions and no occupations in which the consequences of occupational expulsion are so devastating. Public disgrace, loss of livelihood and expulsion from the profession which has constituted his life's work are the disbarred lawyer's fate. See *Bradley* v. *Fisher*, 13 Wall (80 U. S.) 335, 355. Even the most routine of work, tangentially connected with legal practice, is forbidden to the disbarred lawyer. Drinker, *Legal Ethics* (1953), pp. 51 *et seq.*

This is not to question the desirability of the highest standards of behavior. There is nothing inconsistent in requiring both high standards of the professional man and strict proof and fair procedures of his prosecutors and judges. Cf. *Ex parte Secombe*, 19 How. (60 U. S.) 9, 13; *Ex parte Garland*, 4 Wall (71 U. S.) 333, 379.

What cries out in this proceeding is the vulnerability of lawyers to the life and death power of a judicial inquiry which acts in disregard of their fundamental rights. Here surely is a denial of the equal protection to which lawyers too are entitled under the Fourteenth Amendment. This is a clear instance of the failure to give the "protection of the individual against arbitrary action" which Mr. Justice Cardozo called the very essence of due process. *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 302; *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 559.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HERMAN B. GERRINGER,
Counsel for Amicus Curiae,
New York State Association of Trial Lawyers.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1964

No. 415

DAVID A. GOLDNER,

Petitioner,

v.

EDWARD S. SILVER,
District Attorney, King County, State of New York,

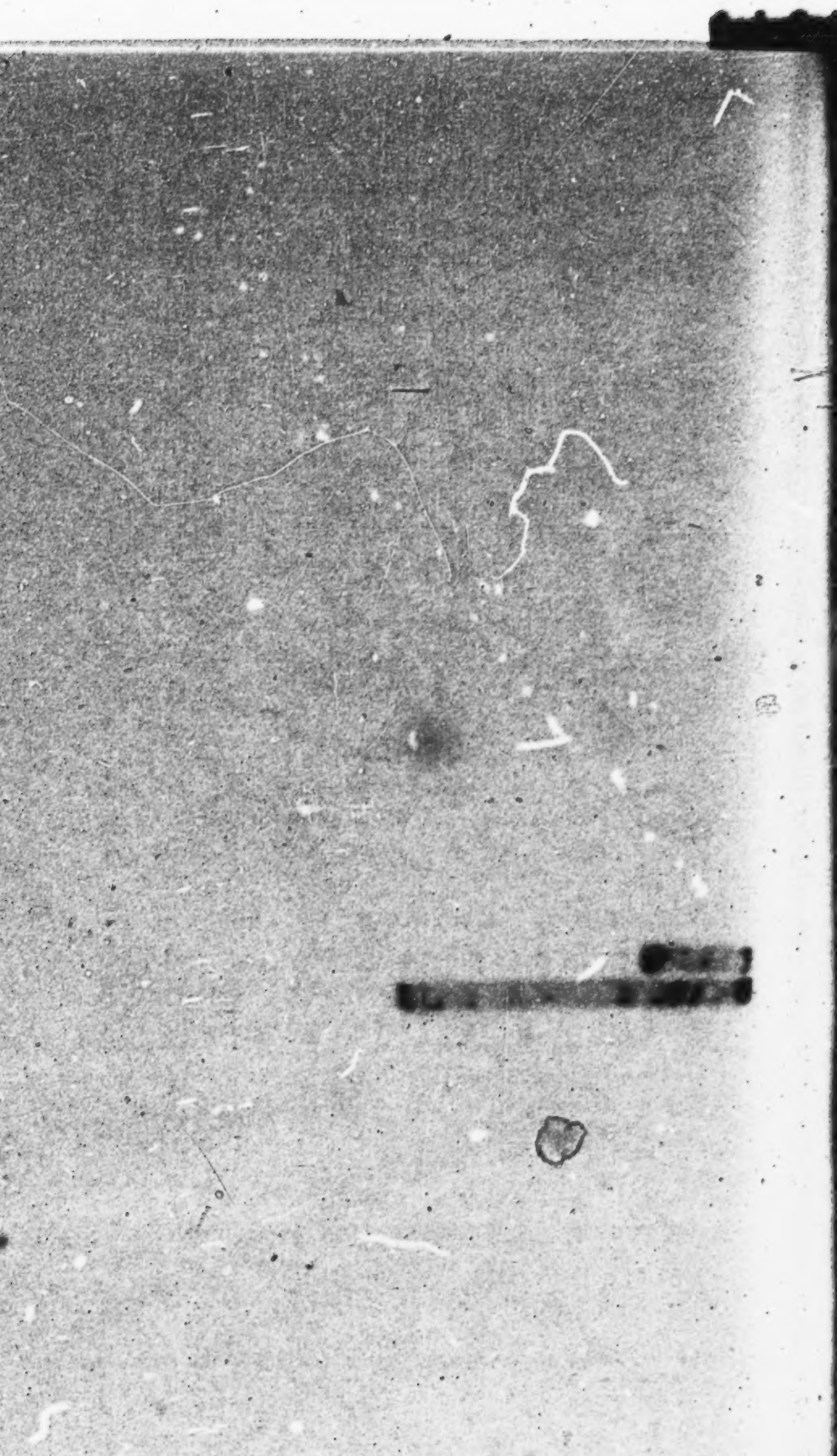
Respondent.

Amicus Brief

[redacted] OF AMERICAN TRIAL LAWYERS ASSOCIATION
[redacted] IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI

ISRAEL, STERNHOOLD
319 Western Union Building
Norfolk, Virginia
Counsel for American Trial Lawyers
Association

Printed by [illegible] & LITTLE, Norfolk, Va.



IN THE

Supreme Court of The United States

OCTOBER TERM, 1964

No.

DAVID A. GOLDNER,

Petitioner,

v.

EDWARD S. SILVER,
District Attorney, King County, State of New York,

Respondent.

MOTION OF AMERICAN TRIAL LAWYERS ASSOCIATION FOR LEAVE TO FILE PETITION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The American Trial Lawyers Association respectfully submits that it is vitally interested in the constitutional question presented by the petition for a writ of certiorari herein for the reasons here stated. This motion is submitted pursuant to and in compliance with Rules 35 and 42 of the Revised Rules of this Court. Both Petitioner and Respondent have consented to the filing of this motion and brief. (Exhibits A and B).

The American Trial Lawyers Association is a national bar association with a current membership of in excess of 14,000. Its membership includes

most of America's leading trial lawyers who generally represent the interests of injured plaintiffs in all fields in which a person may have been harmed wrongfully in his person or property. Its prime function is to preserve the fundamental rights of men through the art of advocacy. Participating in its functions have been members of the judiciary of every State and members of this august body.

It is felt that the question raised by the petition for certiorari squarely presents the fundamental question of the right of the lawyer to be free from undue surveillance by the sovereign.

The lawyer, traditionally, has been the protector of the rights of free men in all recorded civilizations. When despotic governments have sought to stifle freedom and destroy property rights their first target has been the legal profession. Where the lawyers' status has been demeaned and undermined, the status of the judiciary has followed suit. "Peoples Courts" have taken the place of law courts. There is no such thing as independence of the judiciary in the totalitarian states.

This case appears to present facts indicating that the State of New York has sought to breach the right of an individual to be secure in his person, houses, papers and effects, against unreasonable searches and seizures, contrary to the Fourth Amendment to the Constitution. In order to prevent a lawyer from asserting this constitutional right and the protection of the Fifth Amendment, he faces disbarment for failure to "cooperate" with the Bar Association inquiry into his professional conduct. As his livelihood generally depends on his right to pursue the practice of his profession, such lawyer has the choice of *possible* successful defense

after confiscation of his books and records by the Bar Committee, or the *positive* loss of the right to practice his profession by daring to fail to "cooperate" by pleading constitutional rights.

Placing an important and especially sensitive area of our defense mechanism against tyranny in such untenable position would create a dangerous precedent, laying the groundwork for undermining this basic right. At no time since the founding of the Republic has this Court bowed to such pressures. Certainly this day and time of ideological struggle is no time to permit a breach in the constitutional wall set up by our founders for the protection of human rights.

It is for these reasons that the American Association of Trial Lawyers seeks to submit its brief *amicus curiae* in support of the petition for a writ of certiorari.

ISRAEL STEINGOLD
319 Western Union Building
Norfolk, Virginia
Counsel for American Trial Lawyers Association

BRIEF IN SUPPORT OF MOTION

CONSTITUTIONAL PROVISIONS

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

Amendment XIV, Section 1, Clause 2:

". . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT

This petitioner will address itself solely to the constitutional questions involved rather than to the factual situation for the reasons stated in its Motion for Leave to File Brief in Support of Petition for Certiorari.

A judicial inquiry was ordered by the Appellate Division, Second Department, into solicitation and related practices in Kings County, New York.

As part of this inquiry, on November 15, 1957, David A. Goldner, the petitioner, was served with a subpoena duces tecum requiring him to produce for the

Inquiry's examination, all of his personal and business records, tax returns, bank books, check stubs and cancelled checks for the years 1953 through 1956, inclusive. (Appendix A, Goldner Brief, pp. 1-3). Upon compulsion of disbarment for failure to cooperate with the Judicial Inquiry, Goldner complied with the terms of the subpoena.

The records were admittedly used by the agents of the Judicial Inquiry to frame charges against the petitioner, Goldner.

REASONS FOR GRANTING WRIT

The sweeping nature of the subpoena in this case strikes at the very foundation of the constitutional guaranty of the Fourth Amendment against unreasonable searches and seizures. *Schwimmer v. United States,* (CA8, 1956) 232 F2d 855, 860, certiorari denied 77 S.Ct. 48, 352 U.S. 833, 1 L.ed. 2d 52; *Boyd v. United States,* 116 U.S. 616, 622, 6 S.Ct. 524, 29 L.ed 746.

Granting a *carte blanche* subpoena to any grand jury or bar association to compel production of a lawyer's books, records and personal papers on the theory that the end justifies the means is a moral concept rejected by all, and runs counter to the prohibitions of the Fourth and Fifth Ameidments to the Constitution of the United States. Such lawyer is required by this subpoena to become a witness against himself in a criminal case. *Konigsberg v. State Bar of California,* 353 U.S. 252, 257-258 (1957); *Cohen v. Hurley,* 366 U.S. 117, 123 (1961); *Hudson v. Slade,* 3 Foster and Finlason (Q.B.) 390, 411 (1862).

While there may be specious argument seeking

to differentiate between loss of reputation, property rights and the right to the pursuit of happiness, and actual physical incarceration or a fine, it must be conceded that the difference is purely a play on words. Honesty demands that we recognize truth, and the truth is that there is no material difference between the punishment by disbarment of a lawyer and a horrendous fine. And in order not to be misunderstood, the definition of "horrendous" is, "To be regarded with horror; dreadful; terrible; horrible." (The Century Dictionary).

The respondent will doubtless rely on *Cohen v. Hurley*, 366 U.S. 117, 81 S.Ct. 954, 6 L Ed2d 156, *In re Anastaplo*, 366 U.S. 82 (1961) and *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

For many years the individual states were guided by the holding of this Court in *Wolf v. Colorado*, 338 U.S. 25, 27-28, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782. Then, in 1961, this Court re-examined the principle and decided that the states are bound by the terms of the Fourth Amendment, reversing *Wolf v. Colorado*. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L.Ed. 2d 1081.

In this time of political confusion, when any person who disagrees with another on important political, social or judicial principles is denounced as a radical, it behooves this Court to defy nomenclature. This petitioner advocates puristic constitutional thinking. If to be a constitutional purist and to demand that we revert to the intent and philosophy of the framers of the Constitution is radical, then by that definition we are radicals. In this class must go the many great dis-

senters whose dissents became the accepted legal philosophy of their successors.

What Justice Black feared in his able and resounding dissent in *Cohen v. Hurley,* supra, has now come to pass.

In that case, a proceeding similar to this, Cohen refused to testify or to produce records. He invoked his state constitutional rights. The penalty was discipline by the New York Appellate Division in the form of disbarment. He was disbarred, not because he invoked his constitutional privilege against self-incrimination, but rather, because he deliberately refused to cooperate with the Court by refusing to waive his constitutional privilege. 366 U.S. at page 122.

Common sense views such shallow argument with amazement. The amazement is all the greater considering the source of such reasoning. Amazement becomes consternation when the United States Supreme Court upholds such blatant defiance of constitutional guaranties on the most invalid of all theories, that a lawyer is not entitled to the protection of the Fourth or Fifth Amendments because of his status as "an officer of the Court."

Fine distinctions have often been drawn between a right and a privilege. Many decisions, among them some relied on by the majority in *Hurley,* have held that a lawyer practices his profession by sufferance. Up to this point this has been true. We now ask this most august tribunal to declare that once a person has been qualified to practice law and has been made a member of the bar, such membership becomes a right, to be lost only by due process of law.

Would any member of this body agree that in an impeachment action by irate congressmen, the constitutional rights of the members attacked be waived or suspended because of their position of sacred trust, or because of the nature of the attack, or that they forfeit their offices by asserting their constitutional rights? The same argument could be used against them as in *Hurley*. Is it valid?

Ununderstandably, the majority in *Hurley* said, (366 U.S. at page 125):

"Basic to consideration of this aspect of petitioner's case is the fact that the State's disbarment order was predicated not upon any unfavorable inference which it drew from petitioner's assertion of the privilege . . . nor upon any purpose to penalize him for its exercise, but solely upon his refusal to discharge obligations which, as a lawyer, he owed the Court."

He owed the court no greater duty than any other citizen to assert or waive constitutional rights. That the Court or the organized bar might be thwarted from its purpose to clean up ambulance-chasing, or improper division of fees is of no greater importance than efforts to convict traitors, communists, and felons of all descriptions. All attempts to enforce the law are of importance, some of greater and others of lesser degree. Never is the importance of conviction great enough to justify the suspension of our basic liberties guaranteed by the Bill of Rights. That lawyers as a class have been singled out for that dubious privilege is a degradation undeserved, though it be cloaked as an honor.

The truth is that there are warring factions at the bar. Efforts stemming from high sources seek to

destroy the right to trial by jury. Powerful interests seek to destroy the morale of the trial lawyer by attacks on the contingent fee system, grand jury investigations to determine the source of his business, grand jury investigations to examine his books and records and harrassment by grievance committees. This must inevitably tend to destroy the foundation of the right of all persons to be secure in their papers and effects against unreasonable searches and seizures. Where can the line be drawn which would exclude information of clients' affairs where all of a lawyer's books and records are thrown open to his competitors at the bar? All of this was condoned indirectly in *Cohen v. Hurley*. This petition prays that the Court hear the question as now squarely presented.

In the recent case of *Malloy v. Hogan*, 84 S.Ct. 1489, U.S. , L Ed2d , (1964), this Court, adhering to the principle that it will not perpetuate error merely for the sake of historical continuity, said:

> "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme. Thus, although the Court as late as 1922 said that 'neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' * * * Prudential Ins. Co. of America v. Cheek, 259 U.S. 530, 543, 42 S. Ct. 516, 522, 66 L. ed. 1138, initiated a series of decisions which today holds immune from State invasion every First

Amendment protection for the cherished rights of mind and spirit—the freedoms of speech, press, religion, assembly, association and petition for redress of grievances.

"Similarly, Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, decided in 1938, suggested that the rights secured by the Fourth Amendment, were not protected against state action, citing at 302 U.S. 324, 58 S.Ct. 151, the statement of the Court in 1914 in Weeks v. United States, 232 U.S. 383, 398, 34 S. Ct. 341, 346 that "the 4th Amendment is not directed to individual misconduct of [state] officials." In 1961, however, the Court held that in the light of later decisions, it was taken as settled that "* * * the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth * * * ." Mapp v. Ohio, 367, U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed. 2d 1081. Again, although the Court held in 1942 that in a state prosecution for a non-capital offense, "appointment of counsel is not a fundamental right," Betts v. Brady, 316 U.S. 455, 471, 62 S. Ct. 1252, 1261, 86 L.Ed. 1595; cf. Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, only last Term this decision was re-examined and it was held that provision of counsel in all criminal cases was "a fundamental right, essential to a fair trial," and thus was made obligatory on the States by the Fourteenth Amendment. Gideon v. Wainwright, 372 U. S. 335, 344-345, 83 S.Ct. 792, 796.

"[1] We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment

against abridgment by the States. Decisions of the Court since Twining and Adamson have departed from the contrary view expressed in those cases. We discuss first the decisions which forbid the use of coerced confessions in state criminal prosecutions."

We therefore, humbly submit that the Court weigh, with greatest consideration, the words of Justice Black in his scholarly and documented dissent in *Hurley,* (366 U.S. at page 138),:

"I heartily agree with the view expressed by the majority that lawyers occupy an important position in our society, for I recognize that they have a great deal to do with the administration, the enforcement, the interpretation, and frequently even with the making of the Constitution and the other laws that govern us. But I do not agree with the majority that the importance of their position in any way justifies a discrimination against them with regard to their basic rights as individuals. Quite the contrary, I would think that the important role that lawyers are called upon to play in our society would make it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protect the individual against the tyrannical exertion of governmental power. For, in my judgment, one of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become

nothing more than parrots of the views of whatever group wields governmental power at the moment. Wherever that has happened in the world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of his calling and has lost the affection and even the respect of the people.

"Nor do I believe, as the majority asserts, that the discrimination here practiced is justified by virtue of the fact that the courts of England have for centuries exercised disciplinary powers "over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." The rights of lawyers in this country are not, I hope, to be limited to the rights that English rulers chose to accord to their baristers hundreds of years ago For it is certainly true that the courts of England could have then, as the majority points out, made "short shrift" of any barister who refused to "co-operate" with the King's courts. Indeed, those courts did sometimes make "short shrift" of lawyers whose greatest crime was to dare to defend unpopular causes. And in much the same manner, these same courts were at this same time using their "inherent" powers to make "short shrift" of juries that returned the wrong verdict. History, I think, records that it was this willingness on the part of the courts of England to make "short shrift" of unpopular and uncooperative groups that led, first, to the colonization of this country, later, to the war that won its independence, and, finally to the Bill of Rights."

The fear expressed by Justice Black, that this sur-

render of lawyers' constitutional rights would be enlarged and expanded, was a foreboding based on undefiable logic. The question today is here before the Court. He said:
(366 U.S. at p. 143):

> "It is, of course, possible that the majority will allow this process to go no further—that it will not disturb the few remaining constitutional safeguards of the lawyer's independence. But I find no such promise in the majority's opinion. On the contrary, I find in that opinion a willingness to give overriding effect to the lawyer's duty of "co-operation," even to the destruction of constitutional safeguards, and I cannot know how many constitutional safeguards would be sacrificed to this doctrine. Could a lawyer who refused to "co-operate" now be subjected to an unlawful search in an attempt to find evidence that he is guilty of something that a judge might later find to constitute "shady practices"?

CONCLUSION

It should be apparent from the foregoing that the position of the legal profession is in danger of being devitalized on the altar of a misguided obeisance to outmoded medieval concepts. The subservience of the lawyer to the will and tyranny of the sovereign bodes ill to the liberties of all free men won at Runnymede and at Yorktown. When we strip the defender of his arms we destroy the rights of those he seeks to defend. A cowed legal profession is impotent. Each corroding step leads but to the next.

This petitioner joins in the prayer that writ of

certiorari issue so that America's lawyers may be declared persons equal in rights to all other persons, and thereby, that the role of the legal profession in our Republic be maintained and reinvigorated. For there can be no rule of law without the free and independent lawyer to nurture it.

AMERICAN TRIAL LAWYERS ASSOCIATION
By ISRAEL STEINGOLD,
Counsel
319 Western Union Building
Norfolk, Virginia

CONSENT

In re: David A. Goldner v. Edward S. Silver, etc.
Supreme Court of the United States
No. 415, October Term, 1964

To Whom It May Concern:

The undersigned, counsel for petitioner in the above-captioned matter, hereby consents to the appearance *amicus* of the American Trial Lawyers Association.

BERNARD A. BERKMAN
1320 The Superior Building
Cleveland, Ohio 44114

October 22, 1964

Exhibit A

SUPREME COURT OF THE UNITED STATES

DAVID A. GOLDNER,

Petitioner,

v.

EDWARD S. SILVER,
District Attorney, Kings County,
State of New York,

Respondent.

The undersigned, counsel for Respondent, in the above entitled action, hereby consents to the filing of a brief Amicus Curiae by the American Trial Lawyers Association in support of the petition for a Writ of Certiorari, in the above entitled proceeding.

AARON E. KOOTA,
Acting District Attorney,
Kings County

By STANLEY M. MEYER,
Assistant District Attorney

Dated: October 21, 1964
Brooklyn, New York

Exhibit B

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 415

DAVID A. GOLDNER,

Petitioner,

—against—

EDWARD S. SILVER, District Attorney, Kings County, State of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AARON E. KOOTA
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IN THE

Supreme Court of the United States

October Term, 1964

No. 415

DAVID A. GOLDNER,

Petitioner,

—against—

EDWARD S. SILVER, District Attorney, Kings County, State of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a Writ of Certiorari in order to review a judgment of the Court of Appeals of the State of New York, entered on March 26, 1964, affirming an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated December 27, 1961, disbarring petitioner and ordering his name struck from the roll of attorneys (15 A.D. 2nd 558).

Previous Proceedings

The proceedings below were begun by a petition of Edward S. Silver, District Attorney of Kings County, verified on July 15, 1960, charging petitioner with 33 acts

of misconduct, the issues having been then referred to Hon. J. Irwin Shapiro, Special Referee, to hear and report, together with his recommendations, by order of the Appellate Division dated October 31, 1960.

The Special Referee heard testimony from December 1, 1960, to December 7, 1960, and filed his report, dated March 6, 1961, in which he made four conclusions and recommended disbarment. The motion to confirm the Special Referee's report was granted thereby causing petitioner's disbarment and a motion to stay respondent's motion to confirm the Referee's report was denied on June 21, 1961. Petitioner moved to set aside the report of the Referee which was denied by order dated September 21, 1961, reargument of which was denied by order dated October 5, 1961. A further motion for reargument and reconsideration was denied on May 13, 1963. The Court of Appeals of the State of New York affirmed the order of disbarment without opinion on March 26, 1964 (14 N.Y. 2d 593).

Prior to the institution of the proceedings before Hon. J. Irwin Shapiro, the Judicial Inquiry conducted an investigation in 1958, at which petitioner appeared and testified on two occasions and to which he delivered financial books and records pursuant to a subpoena *duces tecum*. These books and records were not physically returned until after the conclusion of the proceedings before the Special Referee. The subject under investigation was solicitation and related unethical practices in Kings County. Petitioner moved for the return of his records in November, 1958, in the Appellate Division and in January, 1959, before the Special Term of the Supreme Court. Both motions were denied.

Regarding the hearing before the Special Referee, petitioner was represented by counsel, presented evidence, cross-examined witnesses, was given many months to prepare his case and was served with formal charges and particulars of the charges. Not once during the hearing did petitioner object, complain, ask for an ajournment or raise the issue that the retention of his records was illegal or that he had been prevented from preparing his defense. He never alleged that he was prevented from copying, using or working with his records. In the years that have passed subsequent to the return of the books and records, petitioner has not claimed or attempted to show in the Appellate Division. The Court of Appeals, this or any other Court that the records contained items which would have been helpful to him at the hearing before the Special Referee.

The Referee's Findings

The Special Referee concluded that petitioner was unfit to remain a member of the profession of the Law based on the following four findings which were confirmed by the Appellate Division.

1. That the "Respondent failed to provide clients" in some instances "with statements relative to the settlement and disposition of their cases" as required by Rule 4-B of the rules of the Appellate Division First Department. (Charge 7-v, dealt with at p. 47 of this report.)

2. That "Respondent divided fees for legal services with persons other than lawyers for services rendered by such persons in the settlement of legal claims or suits in violation of Canon 34", to wit,

with one James Citroen. (Charge 7-z, dealt with at p. 51 of this report.)

3. That "Respondent wilfully procured and induced clients and witnesses" specifically Dominick Dascoli and Gilbert Zucker "to testify falsely on hearings being conducted by an additional Special Term of the Supreme Court into the conduct of attorneys and others" and more specifically "that Respondent told them to state that they had received the proceeds of certain checks issued in their respective names when, in truth, they had not." (Charge 7-aa, dealt with at p. 54 of this report) and,

4. That Respondent committed perjury before me in his testimony with reference to the so-called "yellow sheets" and the alleged retention by his various clients of the proceeds of the "smaller checks" herein dealt with.

POINT I

Attorneys occupy a unique relationship to the public and are subject to supervision of the judiciary to whom they owe an obligation of complete frankness and cooperation.

Since the origins of the common law, attorneys have occupied a unique position in our society in terms of their role in the need for public trust and confidence in our judicial system. Their conduct, both professional and otherwise, has been traditionally supervised by the judiciary and they have been subject to disciplinary action when their standards have fallen below that thought to be in the best interests of their profession. *Randall* v. *Brigham,* 74 U.S. 532, 19 L. Ed. 285, *Ex Parte Wall,* 107 U.S. 265, 2 S. Ct.

569; *Theard* v. *United States*, 354 U.S. 278, 77 S. Ct. 1274. *In re Schofield*, 362 Pa. 201, 66 A. 2d 675; *Welanko's Case*, 99 N.H. 413, 112 A. 2d 50; *Barnes* v. *Walsch*, 145 Me. 107, 72 A. 2d 813; *In re Genser*, 15 N.J. 600, 105 A. 2d 829. In *Cohen* v. *Hurley*, 366 U.S. 117, 81 S. Ct. 954 the Supreme Court said at pages 123-24:

> "History and policy combine to establish the presence of a substantial *state* interest in conducting an investigation of this kind. That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. Not only is the practice of such judicial investigations long-established, but the subject matter of the present investigation does not lack a rational basis. It is no less true than trite that lawyers must operate in a threefold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes. It is certainly not beyond the realm of permissible state concerns to conclude that too much attention to the business of getting clients may be incompatible with a sufficient devotion to duties which a lawyer owes to the court, or that the 'payment of awards to persons bringing in legal business' is inconsistent with the personally disinterested position a lawyer should maintain."

It is needless to belabor the importance for preserving the integrity of the bar, but regulation has been extended into areas of business transactions of attorneys and other

dealings although the attorney-client relationship does not exist, attorneys having been held to owe a duty of absolute good faith to the public which must be reflected in conduct of the highest moral character. *Matter of Zanger*, 266 N.Y. 165, 194 N.E. 72; *Matter of Chartoff*, 16 A.D. 2d 277, 227 N.Y.S. 2d 578; *In re Genser*, 15 N.J. 600, 105 A. 2d 829.

In keeping with this special status of attorneys, it has been recognized in most quarters that when the supervision discharged by the judiciary results in disbarment or disciplinary proceedings of some type, such proceedings are not criminal in nature, the discipline to be meted out not being a criminal sentence and punishment being neither the aim or result of the proceedings. *Cohen* v. *Hurley, supra; Randall* v. *Brigham, supra; Ex Parte Wall, supra; Matter of Rothenberg*, 18 A.D. 2d 397, 239 N.Y.S. 2d 591; *Matter of Mogel*, 18 A.D. 2d 203, 238 N.Y.S. 2d 683; *Matter of Broome*, 13 A.D. 2d 657, 213 N.Y.S. 2d 821; *Matter of Kaplan*, 13 A.D. 2d 231, 216 N.Y.S. 2d 310; *In re Judicial Inquiry*, 19 M. 2d 491, 189 N.Y.S. 2d 79.

This sentiment was put forth in *Cohen* v. *Hurley, supra*, at pages 126-27:

> "A State may rationally conclude that the consequence of disbarment is less drastic than that of a prison term for contempt, albeit arguments to the contrary can be made as well. It may also rationally conclude that procedures resulting in greater preventive certainty are warranted when what is involved is the right to continue to occupy a position affording special opportunities for deleterious conduct-opportunities, indeed, created by the State's original certification of the petitioner's merit. In this regard all that New York has in effect held is that

> petitioner, by resort to a privilege against self-incrimination, can no more claim a right not to be disbarred for his refusal to answer with respect to matters within the competence of the Court's supervisory powers over members of the bar, than could a trustee claim a right not to be removed from office for failure to render accounts which might incriminate him. Finally, where illegal or shady practices on the part of some lawyers are suspected, New York could rationally conclude that the profession itself need not be subjected to the disrespect which would result from the publicity, delay, and possible ineffectiveness in their exposure and eradication that might follow could miscreants only be dealt with through ordinary investigatory and prosecutorial processes. 'If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work.' People ex rel. Karlin v. Culkin, 248 N.Y. 465, 480, 162 N.E. 487, 493 (Cardozo, J.).
>
> These bases for affording a procedure in such judicial inquiries different from that in criminal prosecutions are more than enough to make wholly untenable a contention that there has here been a denial either of due process or of equal protection."

This position was not unique since the Supreme Court has always taken this view. The Court wrote in *Ex Parte Wall, supra* 288, that a disbarment proceeding was:

> "In its nature civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the Courts of justice from the official ministration of persons unfit to practice in them."

Inherent in the Court's power to supervise the dealings of attorneys is the power to examine them under oath and scrutinize their financial and professional records, the right to subpoena having been long established. *Matter of Blumstein*, 253 App. Div. 826, 1 N.Y.S. 2d 598; *Matter of Marlow*, 225 App. Div. 252, 232 N.Y. Supp. 578; *In re Judicial Inquiry, supra.* There are also numerous other examples of government or regulatory bodies properly exercising control over professional or business groups where proceedings evolving from such control must be viewed as different from the normal concept of state action in terms of penal proceedings. *Barsky* v. *Board of Regents*, 347 U.S. 442, 74 S. Ct. 650 (Medical Profession); *Beilan* v. *Board of Public Education, School District of Philadelphia*, 357 U.S. 399, 78 S. Ct. 1317 (teaching); *Lerner* v. *Casey*, 357 U.S. 468, 78 S. Ct. 1311 (transit employee); *Boyd* v. *United States*, 116 U.S. 616, 6 S. Ct. 524 (state banks); *Application of Johnson*, 128 N.Y.S. 2d 874, modified sub. nom.; *Application of Weil*, 283 App. Div. 808, 129 N.Y.S. 2d 501 (horse racing); *Alfaro* v. *Joint Legislative Committee on Professional Boxing*, 36 M. 2d 1018, 234 N.Y.S. 2d 164 (boxing).

The right of the Courts to exercise supervision over attorneys was also recognized by Mr. Justice Harlan and Mr. Justice Frankfurter in a concurring opinion in *Lathrop* v. *Donohue*, 367 U.S. 820, 849 and in his dissenting opinion in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 456, 83 S. Ct. 328 Mr. Justice Harlan said:

> "But the regulation of professional standards for members of the bar comes to us with even deeper roots in history and policy, since courts for centuries have possessed disciplinary powers incident to the administration of justice."

Similar conclusions were reached by Judge Delehant in *Niklars* v. *Simmons,* 196 F. Supp. 691 wherein it was held that disbarment is a matter within the perogative of the State, the right to practice law not arising from the United States Constitution. The Nebraska disciplinary proceeding was viewed as being neither civil nor criminal, a view taken by New York, and the requirements of due process had been met. Such requirements which were alluded to by the Court were also present in the case at bar. Specifications were filed. The respondent had been represented by counsel. The matter had been referred to a Special Referee who made a report after conducting a full hearing. Exceptions were filed and a decision was made by the Court after due consideration. See also *United States* v. *Anonymous,* 215 F. Supp. 111, 113.

Petitioner had an obligation to respond to inquiry regarding his behavior and to make available his entire financial data. His duty was nothing less than complete frankness and cooperation.

POINT II

Petitioner was not denied due process of law but was given all procedural requisites inherent in the concept of a fair hearing as applicable to proceedings of this type.

The soundness of the legal basis of the disciplinary proceedings in this case being unassailable, the question arises as to what standards of due process must be afforded a respondent. The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation but is unfixed and based upon

considerations of time, history, reason and past course of decisions. *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy*, 367 U.S. 886, 81 S. Ct. 1743. Disciplinary proceedings not being penal in nature, it has been held that they need not be formal, nor does the burden of proof beyond a reasonable doubt exist. *Ex Parte Wall, supra; Randall* v. *Brigham, supra; Matter of Mogel, supra.* Procedures can be adopted which considered as a whole in view of the nature of the proceedings may be different from those normally required in criminal prosecutions. *Cohen* v. *Hurley, supra.*

Petitioner complains that his books and records were not physically returned to him prior to the hearings before the Referee thus depriving him of an opportunity to prepare a defense, a right which is concededly included in the concept of fair procedure. The right to which he is entitled though is the opportunity to prepare a defense or explanation and if he is not handicapped in doing so even though his books may be retained illegally, which we argue was not the case here, his rights of due process are not violated. Petitioner bases his contention that the books were illegally retained on his position that no order existed sanctioning the impounding of such records. Yet, he states that he moved for their return in the Appellate Division and then in the Supreme Court, both motions having been denied. It is an exercise in semantics to say that an order denying the request for the return of the books should be viewed differently than one authorizing their retention. The only difference between the two is the identity of the party initiating the motion, the issues litigated and the principles considered therein being the same. The denial of these motions were sufficient authority for retention of the records, if such authority be required by way of Court Order. Implicit in peti-

tioner's argument that no order existed for the retention of his records must be the recognition, which is founded on law, that retention would be proper under certain circumstances. Is it not true then that where such records will be offered in an anticipated disciplinary proceeding involving the special relation of an attorney to the public that there is a duty to retain them? There was ample justification for scrutinizing these records and judicial grounds for keeping them.

It is paramount to remember that petitioner's essential claim is really not that the refusal to return his books constitutes deprivation of his constitutional rights but that his right to prepare his defense was interferred with by their retention. Assuming arguendo that it could be concluded that petitioner, although he did not have physical possession of these records, did have the opportunity to examine them, work with them and copy them, his right to prepare his defense would have remained inviolate. What then occurred in the case at bar? Nowhere does petitioner claim that he was ever denied access to these books and nowhere does he deny that he or his representatives were allowed to work with them. This omission speaks volumes, for the concept of due process does not dictate that a person make use of his opportunity, but only that it be available to him. This is not only true if petitioner did not make use of this opportunity but more so if he did. Petitioner has also not shown how the physical retention of these records have handicapped him. The fact is, the only demand petitioner ever made, via motion and letter, (SR. 181-183) was for the physical return of these records. He never asked according to this record, that he be allowed to use, work with, or copy them. Likewise, at the outset of the hearing no

objection was made nor was this issue raised in any form. At the beginning of petitioner's case (H. 388) nothing was said, nor was objection made when petitioner himself testified (H. 425). There was no objection made when the accountant for the petitioner below testified (H. 210) nor when he referred to these records. Neither was a question raised when the accountant referred to his work sheets (H. 215) although he testified at great length. Actually, petitioner was prepared to meet the testimony of the District Attorney's expert because petitioner introduced much documentary evidence in an effort to dispel the statements of the accountant (H. 450, 452-57 464, 471, 483, 493) and testified at great length regarding his checks (H. 753-57). Petitioner was first apprised of the areas into which investigation was being conducted by his questioning at the Judicial Inquiry and was later specifically advised by the specifications and bill of particulars served on him. He was given exact notice of the charges against him and had many months to prepare his case. The record of the hearings shows that he did so. He introduced evidence, called witnesses, cross-examined and was afforded every opportunity to controvert or explain the charges. He never raised his claim that he had been deprived of an opportunity to prepare a defense nor asked for an adjournment at any point in the hearings. There is no doubt that Special Referee Shapiro would have accommodated him had such a request been made. Even after the hearings were completed when the Referee gave petitioner time to submit a brief this issue was not raised (H. 781-82).

Petitioner sought to demonstrate below that the retention of his records handicapped him by arguing that he could have explained the division of settlement monies re-

garding a client named Dascoli. This argument was not new and is significantly omitted from his brief on this application. It was made in the same language by him at the hearing (H. 276). An examination of the records in this case will show that this holds true regarding all of the items testified to by the expert witness. Petitioner has failed to show even now that any information he could have learned from these records, if in fact he didn't examine them, would have altered in any way anything that occurred at the hearing.

A complete opportunity was presented petitioner to defend these proceedings including all elements of fair procedure and notice applicable to actions of this type. He did not raise his claim at any time during the hearings and has not shown even now how he has been prejudiced.

The retention of petitioner's records could not constitute an illegal search or seizure since this was not a criminal proceeding. *Sackler* v. *Sackler*, 16 A.D. 2d 423, 229 N.Y.S. 2d 61. More protection was given to petitioner in terms of procedure calculated to provide him with a fair hearing than has been required by law. *Sharkey* v. *Thurston*, 268 N.Y. 123, 196 N.E. 766; *Ex Parte Wall, supra; Matter of Mogel, supra; Ames* v. *Dubinsky*, 70 N.Y.S. 2d 706; *Cohen* v. *Hurley, supra; Matter of Broome, supra; Matter of Kaplan, supra.*

It is alleged that *Mapp* v. *Ohio*, 367 U.S. 643, 81 S. Ct. 1684 was decided after petitioner's disbarment but before the pending appeal was decided and that whether the decision is to be applied retroactive to this case is an issue here. Further it is claimed that a retroactive application would dictate a reversal. This is plainly not so. The Court of Appeals has already decided that *Mapp* is to be applied

to all cases in New York where appeals are still pending, *People* v. *Loria*, 10 N.Y. 2d 368, 179 N.E. 2d 478 and since *Mapp* was actually discussed in the briefs and upon argument in that Court in this case, it is evident that the Court of Appeals considered whether the obtaining and retention of petitioner's records constituted an illegal search and seizure. *Malloy* v. *Hogan*, U.S. , 84 S. Ct. 1489 is not really applicable because in this case petitioner never refused to answer questions or give evidence on the grounds of self-incrimination. The statement in *Cohen* v. *Hurley*, *supra*, 125 that:

> "Basic to consideration of this aspect of petitioner's case is the fact that the State's disbarment order was predicted not upon any unfavorable inference which it drew from petitioner's assertion of the privilege, (citations omitted) nor upon any purpose to penalize him for its exercise, but solely upon his refusal to discharge obligations which, as a lawyer, he owed to the court."

is even more applicable with respect to the case at bar than the *Cohen* case. No privilege or claim was raised at any stage of the proceedings and no showing of a lack of reasonable opportunity to prepare a defense, which concededly is due petitioner, has ever been shown. The high duty owed by an attorney to the judiciary as well as the logical and well founded view of the proceedings below as being non criminal sustain the legality of requiring complete financial disclosures such as occurred in the case at bar.

POINT III

The findings of the Special Referee were not improper.

The third and fourth findings of the Special Referee it is claimed were objectionable because petitioner had no notice of them. This is not improper because the Referee had no way of foretelling prior to the hearing that the circumstances would occur that would support these findings. When such is the case, there is no tenet of law preventing proper action by the hearing authority. *Ex Parte Wall, supra; Bradley* v. *Fisher,* 13 Wall 335, 80 U.S. 335. The Referee can draw all reasonable inferences from the evidence presented which reason and experience dictate. This would be true even if the instant proceedings were criminal but more so since they are not. *Tot* v. *United States,* 319 U.S. 463, 63 S. Ct. 1241; *Justice* v. *Lang,* 52 N.Y. 323; *People* v. *Terra,* 303 N.Y. 332, 102 N.E. 2d 576; *Matter of Mogel, supra; Matter of Broome, supra.*

The result of the Referee's conclusion had no penal effect and by no stretch of imagination could petitioner have been deemed guilty of a crime. These findings were within the function of the Referee and were carefully considered by the Appellate Division before its decision was rendered. The case of *In re Oliver,* 333 U.S. 257, cited by petitioner at page 23 of his brief is inapplicable. There the inquiry was being conducted by a "one man grand jury" and the defendant was not afforded an opportunity to be represented by counsel or have a full and fair hearing. The adjudication of contempt was also largely based on the testimony of one witness who had previously testified in

secret and who was not subjected to cross examination by the defendant. Likewise in *Greene* v. *McElroy,* 360 U.S. 474, 79 S. Ct. 1400, cited by petitioner, the accused was also not permitted to confront or cross examine witnesses nor was he allowed to examine files, minutes or records on which the revocation of his security clearance was based. The procedures below were imminently fairer in this case than in any other case referred to by petitioner.

CONCLUSION

The petition for the Writ of Certiorari should be denied.

Dated: Brooklyn, New York
December 1, 1964.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 415

DAVID A. GOLDNER,

Petitioner,

vs.

EDWARD S. SILVER,
District Attorney, Kings County, State of New York,
Respondent.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent's Brief in Opposition to Petition for Writ of Certiorari, in its counter-statement of facts, contains the following paragraph:

> "Regarding the hearing before the Special Referee, petitioner was represented by counsel, presented evidence, cross-examined witnesses, was given many months to prepare his case and was served with formal charges and particulars of the charges. *Not once during the hearing did petitioner object, complain, ask for an ajournment* (sic) *or raise the issue that the retention of his records was illegal or that he had been prevented from preparing his defense.* He never alleged

> that he was prevented from copying, using or working with his records. In the years that have passed subsequent to the return of the books and records, petitioner has not claimed or attempted to show in the Appellate Division. (sic) The Court of Appeals, this or any other Court that the records contained items which would have been helpful to him at the hearing before the Special Referee. Respondent's Brief, at page 3. (Emphasis supplied)

It is apparent that the quoted paragraph is meant to suggest (1) that petitioner has not properly preserved for review by this Court the issues raised in his petition for certiorari; and (2) that he has not demonstrated prejudicial error requiring reversal of the order of disbarment below; consequently, these charges are sufficiently grave, although unfounded, and the language employed by respondent sufficiently misleading to require reply. References to, and commentary upon, other matter in respondent's brief will follow in the order of appearance in the brief of the respondent.

I.

The indelible fact is that petitioner did all in his power at the earliest possible time to raise the issues of illegal search and seizure and due process of law now presented to this Court. The record is replete with judicial and extra-judicial pre-hearing attempts by the petitioner to have his records returned to him after they were confiscated by the Judicial Inquiry pursuant to subpoena *duces tecum* in November, 1957

(See P. 5-6; SR. 74-84; BO. 2*). The dilemma which compelled petitioner to respond to the subpoena of the Judicial Inquiry in the first instance has been outlined elsewhere (P. 18-19; and see SR. 136-137). And at the hearing itself, which, it must be noted, antedated by some six months this Court's ruling in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), that the exclusionary rule was a constitutional command upon the states, petitioner was precluded from moving to suppress the confiscated records or from otherwise objecting to their admission as evidence by the Special Referee's exposition of the law of evidence *as it then existed in New York* during the direct interrogation of the accountant called by the Assistant District Attorney:

> "Q. Will you explain to the Court how these books and records came into your possession?
>
> A. I think they came into my possession by subpoena.
>
> Special Referee: Tell me, does it make any difference how they got there?
>
> Mr. Markowitz [Assistant District Attorney]: I want to introduce them.
>
> Special Referee: If you have the books, introduce them. *In this State, even if they are illegally obtained, you can use them.*

---

* The Petition for Writ of Certiorari is referred to throughout as "P" followed by a page reference. The Brief in Opposition to Petition for Writ of Certiorari is referred to as "BO" followed by a page reference. The transcript of the hearing before the Special Referee is referred to as "H" followed by a page reference. The Report of the Special Referee is referred to as "Report". The Supplemental Record is referred to as "SR"; Supplemental Record A is referred to as "SRA". Numerical references following "SR" and "SRA" are to folios unless otherwise indicated.

Mr. Gittleson [petitioner's counsel]: That is too bad, but it is a fact.

Special Referee: I am afraid I agree with you." (H. 211) (Emphasis supplied)

Moreover, the record denies the statement in respondent's brief that "petitioner has not claimed or attempted to show" any court "that the [confiscated] records contained items which would have been helpful to him at the hearing before the Special Referee" (BO. 3). For the record abundantly reflects not only the frustrations and difficulties under which petitioner and his counsel were required to function at the hearing, but the applications for relief addressed to the judiciary as well.

It must be borne in mind that, as the evidence developed, it became crucial to determine whether the proceeds of certain of petitioner's checks were actually received by the named payees and whether certain of petitioner's clients were charged sums in excess of the actual expenses in their cases. The ultimate resolution of these matters of fact against the petitioner by the Special Referee was a principle ingredient of the findings of subornation and perjury which resulted in petitioner's disbarment.

It is therefore evident that the confiscated checks and checkstubs, the ledgers and account books were vital to the defense, both as direct evidence and as a basis for intensive cross-examination of the accountant, whose testimony as an expert witness was the heart of the District Attorney's case. But the defense was denied the use of these records. Instead they were introduced piecemeal, eclectically, at the

sole whim and caprice of the district attorney, who was in a position rarely attained by an advocate,—a position in which he could sift the evidence *ex parte* and offer the documentary evidence which aided *his* theory of the case and, with impunity, suppress that which might aid his adversary.

A few examples will illustrate how completely the confiscation of petitioner's books and records handcuffed the defense at the hearing.

On direct examination of the accountant, through whom the confiscated documentary evidence was admitted and whose conclusions as an expert witness were largely responsible for the Special Referee's findings of fact relating to subornation and perjury:

"Q. Was there any explanation in the books as to what this $700 was for?

A. May I see that check, please? Is there any check stub? *I will have to bring his check stubs over.*

Q. *We have them in the office.*

A. *There is nothing on here that would say.*

Special Referee: You have nothing before you now in the absence of the check book itself which might possibly have a notation on the stub to give an explanation?

The Witness: *That is right, your Honor . . .*" (H. 220). (Emphasis supplied)

And on cross-examination of the same witness:

"Q. Our records indicate that on that date you said there was a check in Dascoli—for $100 to Dr. Marcus—and you have it for $25.00.

A. Is that check No. 6960?

Q. *I haven't got that, I am sorry. You have all our checks and I can't tell you that.*

A. *The only thing you can do . . . is mark this down and I'd have to check it. That's the only thing I can do. I haven't got it here. . . .*" (H. 274). (Emphasis supplied)

Petitioner's own testimony demonstrates dramatically the handicap under which the defense was laboring. For example, on direct examination:

"Q. What was the check in between? I notice one for $500, dated December 10, 1954, check #6782, and this one is dated December 13 for $3,000, #6784. What was the one in between?

A. *I don't know. I don't have my books.* But it could have been a check in reference to the case, something outstanding." (H. 460a). (Emphasis supplied)

And on cross-examination of the petitioner:

"Q. . . . I show you these two checks which are now marked respectively Petitioner's Exhibits 17 and 18 in the Zucker case, one for a thousand dollars and one for $2,983.50 and point out to you that they bear the numbers respectively 5206 and 5207 and are dated—one dated March 19 and the other dated March 19—and I ask you whether or not this check numbered 5204 made to the order of James A. Citroen in the sum of $700.00 dated March 12, 1954, is in connection with the Zucker case.

The Witness: Your Honor, I would like to see what check number 5205, which is missing, which might give me some idea of it——

Special Referee: Do you have those records here?

Mr. DiBlasi [Assistant district attorney]: In the meantime, Judge, maybe I can straighten it out with his own records, if I may be permitted to ask him a question.

Special Referee: All right. 5205—is this check for twenty dollars to Dr. Abraham Cohen?

The Witness: Yes. There's one thing else that would really help me. *They have my checkbook stubs. May I see that?*

Special Referee: Go ahead, Mr. DiBlasi.

Q. Is that the check?

A. Yes, but I question what case it is for . . . *This is taken from the checkbook stub. You know, those stubs that I turned in to you fellows, to the Judicial Inquiry . . . From that I could tell. Not from this.* This isn't the accountant's entry. . . ."

* * * *

"Q. Directing your attention to Petitioner's Exhibit 32, which is the check for $700.00, that was made to Citroen in payment for services rendered in connection with the Zucker case?

A. *I still tell you. I don't know without looking at the checkstub book.*" (H. 614-617) (Emphasis supplied)

Further, on cross-examination of the petitioner:

"Q. You wouldn't charge petty cash to a particular case in a ledger?

A. No, not that I know of.

Q. And you know that. You know that to be a fact?

A. I think so. As far as I know. *I'm not sure, but I haven't even looked at the books before I gave them and asked for them back. I haven't even looked at them. And now I haven't seen them in at least three years.*" (H. 602) (Emphasis supplied)

Further cross-examination:

"Special Referee: Didn't you say so?

The Witness: Yes. That the retainer was, as I recalled, signed in September. That's what I recall.

Q. You say a previous letter——

Mr. Gittleson: May I respectfully ask if our friend has the file. *They took it away. They have it somewhere. If they have it why don't we get to the retainer?*

Mr. DiBlasi: *I have no file . . .*

Special Referee: All right. Proceed." (H. 659) (Emphasis supplied)

Further:

"Special Referee: Mr. Goldner, do you have your files available for 1954, 1955 and 1956?

The Witness: Yes, I probably have almost all of them.

Special Referee: Do you have the subject books, the checkbooks?

The Witness: *No, they have those. I furnished those over to the Inquiry.*

Mr. DiBlasi: *We don't have them. He turned them over to the Inquiry but they never furnished them over to us.*

Special Referee: There is a sharp issue of fact here. This man's right to remain a member of the bar may very well be at stake . . ." (H. 731) (Emphasis supplied)

Finally, the following colloquy:

"Mr. Gittelson: So that the record is straight, we made demand for the production of the original check, but due to the confusion that existed they weren't produced. *I think they will concede that they had our checks.*

Special Referee: When you say you made demand, I assume you mean on the Judicial Inquiry?

Mr. Gittelson: No, we made the demand on Mr. DiBlasi.

Special Referee: All right is there anything else on cross?

Mr. DiBlasi: *My staff had looked for them, but weren't able to find any checks in this matter* . . ." (H. 780-781) (Emphasis supplied)

II.

Furthermore, petitioner's dilemma with regard to the seizure and unavailability of the confiscated records was presented after the hearing in timely and detailed fashion to both of the courts below: The Appellate Division (SR. 72-117) and The Court of Appeals of the State of New York (Brief of Respondent-Appellant, pp. 12-15; 24-26. Reply Brief of Respondent-Appellant, pp. 4-5), particularly and immediately after this Court announced its decision in *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

The prejudice to petitioner resulting from the illegal seizure and detention of his records has been amply demonstrated in each court below and in this Court. Since this Court has rejected the notion that state courts are the final arbiters of whether unconstitutional procedures have tainted a hearing or trial so as to require reversal, and instead, reviews state court proceedings to determine whether there is a *reasonable possibility* that the unconstitutional procedures *might have contributed* to the result, *Fahy* v. *Connecticut,* 375 U. S. 85 (1963), the record below clearly meets this broad test of reviewability and demonstrates the necessity for reversal here.

III.

The argument made by respondent at page 10 of its brief that the refusal of the New York courts to return petitioner's records to him after they were confiscated by subpoena, somehow converts an illegal search, seizure and detention of records into lawful conduct is more than "an exercise in semantics" (BO. 10). Respondent's contention misses the entire thrust of petitioner's argument; for if the search and seizure and detention of records were illegal in the first instance, as petitioner contends, no judicial imprimatur of a state court can convert such acts into lawful behavior; rather, the court orders denying petitioner's motions for relief are themselves in contravention of constitutional command, and consequently, nullities at best.

IV.

Respondent attaches great significance to the fact that "the only demand petitioner ever made . . . was for the physical return of these records. He never asked . . . that he be allowed to use, work with, or copy them" (BO. 11). So far as the contentions made by petitioner that the records were acquired by means of illegal search and seizure are concerned (P. 17-21), the respondent's argument is hopelessly irrelevant. If, as petitioner contends, the law enforcement authorities were not entitled to possession of the documents at all, it can hardly be seriously contended that they could in any manner retain the option to select for the petitioner the mode by which he might use his own records. Even so far as the charge of illegal detention of the records is concerned (P. 21-22), it is evident that the legal and extra-legal action taken by petitioner to secure the *broad* relief of return of the documents at least includes the *more narrow* relief of permitting access to them, upon the principle that the *greater* request includes the *lesser*. It cannot now be denied that a court to whom such application was made had the jurisdiction to fashion a more narrow remedy than was sought by petitioner, if it had wished to do so.

V.

At page 14 of its brief, respondent urges that *Malloy* v. *Hogan*, 378 U.S. 1 (1964) "is not really applicable" here because its facts are not identical to those in the case at bar. Once again the respondent has missed the point of the argument.

The holding in *Malloy* that the Fifth Amendment privilege against self-incrimination is a command upon the states by virtue of the Fourteenth is readily pertinent to the issues here raised. The Fourth and Fifth Amendments have long been inter-related in the history of criminal due process. Many of the search and seizure cases in the *federal* jurisdiction have turned upon interpretations of the commands of both the Fourth and Fifth Amendments, intermingled to be sure, but readily distinguishable. e.g., *Boyd* v. *United States,* 116 U.S. 616 (1886); *Gouled* v. *United States,* 255 U.S. 298 (1921). Even in *Mapp* v. *Ohio,* 367 U.S. 343 (1961), at least one member of this Court felt it necessary to combine the effect of the Fourth and Fifth Amendments before concurring in the application of the exclusionary rule to *state* action as a command of the Fourteenth Amendment. *Mapp* v. *Ohio,* 367 U.S. 643, 661-666 (1961) (concurring opinion).

Furthermore, the argument made by petitioner that the compulsory production of evidentiary matter constitutes an illegal seizure (P. 20-21), rests squarely upon the combined effect of the search and seizure provisions of the Fourth Amendment and the self-incrimination provisions of the Fifth. *Boyd* v. *United States, supra; Gouled* v. *United States, supra; United States* v. *Lefkowitz,* 285 U.S. 452 (1932).

It is readily apparent that in the instant case in which petitioner contends that both the Fourth and Fifth Amendments were violated by the State of New York, the decision in *Malloy* neatly complements the holding in *Mapp* to make symmetrically clear the

responsibility of the State of New York to comply with the commands of both Amendments.

One further compelling pertinency of *Malloy* to the case at bar. Respondent relies heavily upon this Court's decision in *Cohen* v. *Hurley*, 366 U.S. 117 (1961), upholding the right of the State of New York, as a rational scheme to rid the legal profession of undesirable practitioners, to abrogate the protections of criminal due process in disciplinary proceedings.

It may well be that, in view of the emerging federal standards of criminal due process, exemplified by *Mapp* and *Malloy*, the entire holding in *Cohen* v. *Hurley* has been undercut and should be re-examined. In any event, the case at bar is readily distinguishable from *Cohen* v. *Hurley*; for, in *Cohen* v. *Hurley*, no *federal* constitutional rights were violated by the State of New York, simply because the states were not *at that time* bound to enforce the privilege against self-incrimination contained in the Fifth Amendment and which was in issue in that case. (See discussion at P. 12 and f. n. 11). Consequently, *Cohen* v. *Hurley* stands for nothing more than the bare proposition that this Court will not interfere with a *state* scheme to discipline attorneys which abrogates, in some measure, *that state's* standards of due process of law. It leaves open, however, the question presented by this petition for writ of certiorari—whether such state action may violate minimal *federal* standards of due process, which, since *Mapp* and *Malloy*, require state compliance with the commands of the Fourth and Fifth Amendments.

Conclusion

For the foregoing reasons, as well as for the reasons set forth in his petition for writ of certiorari, petitioner renews his prayer that the petition for writ of certiorari be granted.

Rsepectfully submitted,

BERNARD A. BERKMAN,
Counsel for Petitioner.

ILE COPY

Office-Supreme Court, U.S.
FILED
FEB 11 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 415

DAVID A. GOLDNER,

Petitioner

—against—

EDWARD S. SILVER, District Attorney, Kings County, State of New York,

Respondent

APPLICATION FOR REHEARING FOR A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

DAVID A. GOLDNER,
Pro Se
6 The Hemlocks
Roslyn Estates, N.Y.

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Respondent

APPLICATION FOR REHEARING FOR A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The within application is respectfully submitted by the petitioner, pro se, for a rehearing of an application praying that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, the original petition for said writ having been denied by this Court.

Your petitioner has exhausted all means at his disposal to obtain a review of his disbarment, has engaged able counsel to represent him, and expended substantial sums in payment of legal expenses in an effort to seek vindication.

All doors have been closed, and your petitioner respectfully makes this final and last effort, by himself, to obtain redress from what he deeply believes to have been a miscarriage of justice.

Your petitioner is not certain that this method or the format of this petition meets with the requirements of this Court, but feels that the deep interest which this Court has shown in the preservation of individual human rights, is sufficient to insure to your petitioner, a last opportunity for redress.

Your petitioner has no intention of burdening the Court with a repetition of the constitutional questions involved, as these questions have been ably presented to the Court by counsel and are now contained in the file relating to this matter, in the possession of the Court.

Instead, your petitioner will attempt to bring before this august body, matters which he believes have not been previously presented or matters regarding which the Court may not be fully aware, hoping to make such presentation, with such control of his emotional involvement, as he is able to muster.

An examination of the record before this Court will reveal that three of the five Justices of the Appellate Division of the State of New York, before whom this motion for disbarment was pending, originally voted against disbarment (Exhibit C). The grounds for such vote are reflected in the following memorandums of Justices Christ and Pette.*

---

* Memorandums referred to above are attached hereto as Exhibits A and B.

"A man should not be disbarred except after a hearing of the charges against him. This respondent is being disbarred for perjury before the referee, but he has never been so charged with the opportunity to answer and be heard on this issue. I do not believe this should be done. *The case against this respondent is a lot weaker than I supposed it to be.* (Emphasis supplied) We must discuss before we can decide the matter. Even the subornation of perjury is heavily dependent on the testimony of the perjurers. The corroboration seems weak.

October 6, 1961
Christ (VAC)"*

"PETTE, *J.*

Under the Special Referee's decision respondent was found guilty of four offenses (Report, pp. 60-61):

(1) Failure to furnish closing statements;

(2) Dividing legal fees with one non-lawyer;

(3) Inducing two witnesses to testify falsely in the Inquiry;

and

(4) Committing perjury before the Referee through the media of the so-called 'yellow sheets'.

On offenses Nos. 1 and 2 the Referee only indicated that a punishment no more severe than censure would be in order, but that the other offenses added thereto required disbarment.

---

* "VAC": Vote against confirmation.

On No. 3 only the testimony of Dascoli and Zucker was found indicative of respondent's guilt (although nine persons were at first alleged), and the finding of guilt thereon is dependent upon the rejection of the 'yellow sheets' in their cases (Sp. Ref's. Rep., p. 57). On No. 4, it seems to me, we have a dispute over whether the 'yellow sheets' were so fairly in issue as to require respondent to verify their legitimacy. On No. 4 we have the Referee's comment that not only were the Dascoli and Zucker 'yellow sheets' fabricated but that all of respondent's 'yellow sheets' were false, though these others were not in issue, and the Referee's further comment that 'it is most singular' that respondent did not produce all his files to show that all contained such 'yellow sheets' (Report, p. 57).

Since, in effect, the severity of punishment is dependent upon the legitimacy of all the 'yellow sheets' used by respondent during the period of time in question, it is my present view that this issue should be sent back for further hearing and report to cure the void thereon in the present record. After such hearing and report, a proper finding may be made as to whether all of the 'yellow sheets' were in fact innocent or tainted, an issue on which at present there can only be conjecture since respondent was neither taxed therewith nor advised that an explanation thereon should be forthcoming."

The memorandum of Justice Christ is greatly revealing, in that it discloses a clear acknowledgment that the Justices participating in that vote, were made knowledgable with the alleged facts relating to your

petitioner, substantially more severe than those which were adduced at the trial, and which were before the Justices at the time of the motion for disbarment.

The statement in the memorandum of Justice Christ, "The case against this respondent is a lot weaker than I supposed it to be", clearly denotes that much was told to the Justices off the record; that they were made familiar with alleged facts, the product of rumor and gossip, all of which, without doubt, created an atmosphere of prejudgment.

The view of Justice Pette, as reflected in his memorandum, is equally revealing. It establishes his own uncertainty as to the propriety of the manner in which the findings regarding the guilt of your petitioner were made. In no uncertain terms, his recommendation calls for the return of the issue for further hearing and report, "to cure the void thereon in the present record".

Justice Pette acknowledges in his memorandum, that, at the time, there was only conjecture with respect to the substantial finding of guilt, and calls for an explanation, pointing out that your petitioner was neither advised nor afforded an opportunity to meet the serious charge of perjury.

The record is void of any indication as to the forces, legal concepts or logic which prevailed upon these Justices to overcome their fundamental objections, and to persuade them, finally, to vote for your petitioner's disbarment.

It is noteworthy, that these influences, whatever they may have been, were unfruitful with respect to

Justice Kleinfeld, as he remained steadfast in his disapproval of your petitioner's disbarment, the final vote being four in favor of disbarment, with Justice Kleinfeld abstaining.

It was the same Court which sanctioned the original inquiry, which heard all prehearing motions, which made the reference to an Official Referee, and it was this Court which made the final determination. Can it be assumed that their judgment ordering disbarment was based only on the facts adduced properly at the trial, or, is it more reasonable to believe that all of the preliminary information had so permeated their awareness, that their judgment was tainted with unwitting prejudice? How else can one explain the quoted statements of Justices Christ and Pette.

Your petitioner became aware of these facts in the course of examining the file before this Court and obtained photostats of the exhibits made part of this application on February 9, 1965.

The following report of Justice Brennan, who was one of the participating Justices, is greatly significant.

> "I have set forth this rather lengthy preliminary, partially to explain the long delay since the motion was made to confirm the report, to show the status of the matter, to show the respondent's vigorous contest against the disbarment proceeding, etc. The respondent has a right to use every legal means to fight the disbarment proceeding. The fact that the Referee recommended dismissal of most of the many specifications shows that he has been successful to some extent. However, the Referee still recommended

disbarment. It is my impression that, in part, the vigorous contest by the respondent and able counsel has been for the purpose of delay. While the proceeding is pending, he can still practice law—including cases involving negligence actions."

It is clear from Justice Brennan's report, that his opinion regarding your petitioner, was more deeply permeated by the rumors and alleged facts discrediting your petitioner. He concluded that the determined defense of your petitioner was motivated only by economic consideration, and he excluded any possibility that the persistent defense of your petitioner could have been the result of his earnest desire to remain a member of the Bar. and his deep convictions, that he was not guilty of wrong doing.

The fact is, that your petitioner considers his disbarment a personal tragedy, transcending all economic considerations. The great injury which your petitioner suffered, is not an economic one, but rather that which has torn away the pillars upon which he stood and stands as a human being. The effect upon his children, his family, his friends, this is the great loss which your petitioner has suffered, and this is what Justice Brennan completely lost sight of when he said "It is my impression that, in part, the vigorous contest by respondent and able counsel has been for the purpose of delay. While the proceeding is pending, he can still practice law—including cases involving negligence actions."

Such a statement is unworthy of a Judge. It reflects a prejudgment of the facts. It is the cynical

reflection of a man who has made up his mind, irrespective of the merits. Had Justice Brennan been right in his appraisal of your petitioner, the offer made by the Official Referee near the end of the hearing, for a suspension of three years, would have been gladly accepted by your petitioner. The fact remains that your petitioner was firm in his conviction, that the facts well justified his innocence and he refused such an offer.

It is respectfully called to the Court's attention, that the file which was before this Court in connection with the original application, contained in it, letters from the United States Treasury Department, Chief of the Intelligence Division, and a letter from the Acting United States Attorney, Wickersham. The first letter mentioned, indicated that your petitioner was undergoing a special investigation by the Treasury Department of the United States, and the second letter referred to, requested your petitioner's file for the purpose of an examination to be conducted by the Federal Bureau of Investigation.

Neither of these letters had anything to do with the hearings or with the disbarment proceedings or with the guilt or innocence of your petitioner in connection with same, nor were they a necessary part of the record on appeal. Why, then, were these letters inserted in the file and permitted to remain available for consideration in connection with appeals of your petitioner's disbarment? The inferences generated by these two letters are obvious and clear. They served to brand your petitioner as a prime suspect of an illicit and surreptitious enterprise.

It is to be noted that the Appellate Division, which subsequently ruled on your petitioner's disbarment, authorized, by an order, ex parte (Exhibit D), the surrendering to the Federal Bureau of Investigation, of all data and information contained in your petitioner's file. It is important to observe that this was done before the same Court ordered your petitioner's disbarment. Could it be said then, that they were unprejudiced or devoid of prejudgment at the time they rendered their disbarment decision?

It is most significant that your petitioner has never been indicted for any crime by the State of New York or by the United States Government, despite the thorough and painstaking inquiries by many Governmental Agencies, and in spite of the fact that all of your petitioner's books and records were laid bare to these Agencies to search as they pleased and to incriminate as they wished.

The lengthy hearings, the parade of witnesses, the availability of your petitioner's records, the deprivation of your petitioner from preparing a proper defense, failed to adduce a finding substantiating any of the charges contained in the bill of particulars served upon your petitioner.

Instead, the disbarment of your petitioner was predicated upon a charge arising out of the hearing itself, consisting of certain yellow sheets alleged to have been fabricated by your petitioner, never before raised by those preparing the case against your petitioner, nor did this finding of fabrication result in any criminal charge against your petitioner.

Certainly, elementary Justice required that the issues raised by these alleged fabricated yellow sheets should have been inquired into at a hearing, to afford your petitioner the opportunity to meet the accusation.

Your petitioner earnestly pleads with this Court to reconsider its previous denial and to grant a writ of certiorari herein, so that the true issues involved may be heard by this Court in full debate, and thus, a substantial wrong, which your petitioner feels has been perpetrated, can be rectified, consistent with the proper administration of Justice, and the preservation of individual human rights.

Respectfully submitted,

DAVID A. GOLDNER
Pro Se

Certificate

I hereby certify that the foregoing application for rehearing is filed in good faith, and not for purposes of delay.

Dated: New York, N.Y.
February 11, 1965

DAVID A. GOLDNER

Exhibit A

(PHOTOPRINT)

[For convenience of Court and Counsel this Document is bound in on the opposite page]

Exhibit A

PHOTOPRINT)

Court and Counsel this Document is on the opposite page]

12

In the Matter of the Petition of Edward S. Silver, District Attorney of the County of Kings, pursuant to section 90 of the Judiciary Law, petitioner, against David A. Goldner, an Attorney and Counsellor-at-law, respondent.

BRENNAN, J. Motion to confirm report of Hon. J. Irwin Shapiro granted and respondent disbarred. September 29, 1961

Christ, J. U.S.C. (Mo) OCT 6 1961

I think should not be disbarred except after a hearing of the charges against him. The respondent is being disbarred for perjury before the referee, but he has never been so charged with the opportunity to answer and be heard on the issue. I do not believe that this should be done. The case against this respondent is a lot weaker than I supposed it to be. We must discuss it before we can decide the matter. Even the subornation of perjury is largely dependent on the testimony of the perjurers, the corroboration seems weak.

Exhibit B

PETTE, *J.*

Under the Special Referee's decision respondent was found guilty of four offenses (Report, pp. 60-61):

(1) Failure to furnish closing statements;

(2) Dividing legal fees with one non-lawyer;

(3) Inducing two witnesses to testify false in the Inquiry;

and

(4) Committing perjury before the Referee through the media of the so-called "yellow sheets".

On offenses Nos. 1 and 2 the Referee only indicated that a punishment no more severe than censure would be in order, but that the other offenses added thereto required disbarment.

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files to show that all contained such "yellow sheets" (Report, p. 57).

Since, in effect, the severity of punishment is dependent upon the legitimacy of all the "yellow sheets" used by respondent during the period of time in question, it is my present view that this issue should be sent back for further hearing and report to cure the void thereon in the present record. After such hearing and report, a proper finding may be made as to whether all of the "yellow sheets" were in fact innocent or tainted, an issue on which at present there can only be conjecture since respondent was neither taxed therewith nor advised that an explanation thereon should be forthcoming.

Exhibit C

In the Matter of the Petition of Edward S. Silver, District Attorney of the County of Kings, pursuant to section 90 of the Judiciary Law, petitioner, against David A. Goldner, an Attorney and Counsellor-at-law, respondent.

BRENNAN, J.	Motion to confirm report of report of Hon. J. Irwin Shapiro granted and respondent disbarred.	September 29, 1961

Beldock, Acting P.J. Concur.

Kleinfeld, J. V.A.C.

Christ, J. V.A.C. (see memorandum attached)

Pette, J. V.A.C. (see Memo. attached)

Exhibit D

SUPREME COURT: APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

In the Matter of the application, pursuant to the Judiciary Law (Section 90, subdivision 10), for permission to examine the records of the judicial inquiry, investigation and proceeding relating to the conduct of

DAVID A. GOLDNER,

an Attorney-at-Law.

Good cause having been shown by Cornelius W. Wickersham, Jr., United States Attorney for the Eastern District of New York, it is hereby:

ORDERED, pursuant to the Judiciary Law (Section 90, subdivision 10), that the Clerk of this court, that the District Attorney of Kings County, and that the Judicial Inquiry Into the Conduct of Attorneys and Counsellors at Law in Kings County, be and they each are hereby authorized to divulge to the said United States Attorney, to the Federal Bureau of Investigation and to any other governmental agency, all the records of the judicial inquiry, investigation and proceeding, which are in the custody or control of said Clerk, District Attorney and Judicial Inquiry, relat-

ing to the conduct of David A. Goldner, an attorney-at-law.

Dated, Brooklyn, New York, August 2, 1960.

GERALD NOLAN
Gerald Nolan

GEORGE J. BELDOCK
George J. Beldock

HENRY L. UGHETTA
Henry L. Ughetta

MARCUS G. CHRIST
Marcus G. Christ

NICHOLAS M. PETTE
Nicholas M. Pette

ARTHUR D. BRENNAN,
Arthur D. Brennan

Justices of the Appellate Division of the Supreme Court, Second Judicial Department.